Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-29

PEABODY COAL COMPANY,
Petitioner,

v.

MISSOURI PUBLIC SERVICE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals, Western District

THOMPSON & MITCHELL
WILLIAM G. GUERRI
JOHN H. STROH
One Mercantile Center
St. Louis, Missouri 63101

DIETRICH, DAVIS, DICUS, ROWLANDS & SCHMITT
EDWARD E. SCHMITT
1001 Dwight Building
1004 Baltimore Avenue
Kansas City, Missouri 64105

Attorneys for Petitioner,
Peabody Coal Company

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PRAYER

Peabody Coal Company ("Peabody"), Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Western District ("Missouri Court of Appeals"), entered in this action on January 29, 1979.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is unreported and is reproduced in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC § 1257(3) to review the judgment and opinion of the Missouri Court of Appeals which applied a State statute in said judgment and opinion in such a manner as to deny to Peabody the equal protection of the law and to deprive Peabody of its property without due process of law, guaranteed by Article XIV of the Amendments to the United States Constitution.

The judgment and opinion of the Missouri Court of Appeals was entered on January 29, 1979, affirming a judgment against Peabody entered by the Circuit Court of Jackson County, Missouri, on May 16, 1977.

On February 13, 1979, Peabody filed in the Missouri Court of Appeals a motion for rehearing or, in the alternative, an application for transfer of the appeal to the Supreme Court of Missouri (Appendix B). The Missouri Court of Appeals overruled the motion and denied the application on February 26, 1979 (Appendix E).

Thereafter, on March 13, 1979, Peabody filed an application in the Supreme Court of Missouri for an order transferring the appeal to that Court (Appendix C). The Supreme Court of Missouri denied the application on April 10, 1979 (Appendix F).

Thereafter, on April 18, 1979, Peabody filed a motion in the Supreme Court of Missouri for that Court to suspend its rules barring reconsideration of its denial of the application for transfer and for reconsideration of Peabody's application for transfer (Appendix D). The Supreme Court of Missouri overruled the motion on June 19, 1979 (Appendix G).

STATUTE INVOLVED

The pertinent section of the Uniform Commercial Code which is drawn into question by the judgment and opinion of the Missouri Court of Appeals is § 400.2-615. R.S.Mo. 1969, providing as follows:

> **"Excuse by failure of presupposed conditions.**—Except so far as a seller may have assumed a greater obligation and subject to section 400.2-614 on substituted performance:
>
> "(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> "(b)Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> "(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

The above Section 2-615 of the Uniform Commercial Code is in force in all of the United States (except Louisiana) and in the District of Columbia.

QUESTION PRESENTED

Whether a State appellate court, in applying a state statute excusing all sellers from performance of sales contracts becoming commercially impracticable, which intentionally creates two classes of sellers, those who are large or strong and those who are not, and uses these classes as the criteria for determining the availability of the excuse,

A) has denied the equal protection of the law to the seller whose performance has become commercially impracticable, who is found to be large or strong and who is consequently not excused, and

B) has deprived the seller, whose performance has become commercially impracticable, of his property without due process of law, when he is found to be large or strong and is consequently not excused?

STATEMENT OF THE CASE

Introduction

The opinion of the Missouri Court of Appeals has raised a question that has not heretofore been decided by this Court or, to the best of our research and knowledge, by any Court in the United States. The question is:

> In determining whether or not performance of a contract under Section 2-615 of the Uniform Commercial Code is commercially impracticable, is it constitutionally permissible for the Court to create intentionally two classifications of sellers, large or strong on one hand and small or weak on the other, and then to use these classes as the criteria for granting or withholding relief to the seller, when the statute by its terms applies to *all* sellers without regard to any classification?

The decision of the Missouri Court of Appeals in creating, what constitutes we submit, an arbitrary and unreasonable classification between sellers, contrary to the applicable decisions of this Court, has an impact far beyond this case and far beyond the boundaries of the State of Missouri. Section 2-615 of the Uniform Commercial Code is in force in all of the United States (except Louisiana) and in the District of Columbia. Consequently, a decision relating to the commercial law of one state, Missouri, in the application of Section 2-615 is of broad scope. Such a decision has precedential value in all states, in all of the Courts of the United States, and in many Federal administrative proceedings in which the doctrine of commercial impracticability may be applied.

Parties

This proceeding arises out of an action for specific performance of a long-term Coal Supply Agreement ("Agreement") between Peabody, the seller, and Respondent, Missouri Public Service Company ("Public Service"), the buyer. Peabody is a large producer and seller of coal, and Public Service is an electric utility company operating a coal-fired generating station, serving customers with electric power in northwest Missouri.

The Coal Supply Agreement

The Agreement, executed in 1967, called for Peabody to supply coal to Public Service's generating plant for a period of ten years. The Agreement became operational in June, 1969, when the generating plant was ready to receive coal. Although

the Agreement terminated in June, 1979, this case is not moot since Peabody would be entitled to restitution and damages if the judgment of specific performance was improper.

The price of coal from time-to-time sold and delivered by Peabody to Public Service was to be computed by means of escalations to or de-escalations from a base price. One contract escalator to adjust the base price was an adjustment for changes in the cost of materials and supplies, explosives, electric power, and administrative and supervision expense which was to be made on the basis of changes in the Industrial Commodities Index ("Index") shown on the Indices for Wholesale Prices issued by the Bureau of Labor Statistics, United States Department of Labor.

The use of this Index as a basis for adjustment of these costs had been agreed upon by Peabody and Public Service as an accurate reflector of their increases or decreases. In fact, it was the failure of this Index to provide an accurate reflection of cost changes that precipitated the dispute between the parties. On May 6, 1975, Peabody notified Public Service that performance of the Agreement was commercially impracticable, that the Agreement was terminated in sixty days, and Peabody offered to continue to supply coal at a higher price. By May 30, 1976, the total amount expended by Peabody for materials and supplies exceeded the amounts recovered under the Agreement by $3,401,789. Through the same date, Peabody suffered a loss of $3,020,019 in performance of the Agreement, at least $1,223,573 of which was directly attributable to the failure of the Index to reflect increases to these costs.

Commencement of Litigation

On May 23, 1975, Public Service commenced this action by filing its petition for specific performance of the Agreement and for damages for breach of the Agreement. By agreement, a

separate trial was held on the issue of specific performance. The Circuit Court entered judgment against Peabody for specific performance, and that judgment was affirmed by the Missouri Court of Appeals in its judgment and opinion filed on January 29, 1979.

Peabody's Defense of "Commercial Impracticability"

Public Service alleged that Peabody had breached the Agreement by refusing to perform further under its terms, some eight years after the execution of the Agreement, and after having performed under it for some six years. Peabody's defense was based on its claim that further performance was excused by law, Section 2-615 of the Uniform Commercial Code (§ 400.2-615, R.S.Mo.), inasmuch as performance had become commercially impracticable due to the occurrence of contingencies not within the reasonable contemplation of the parties at the time that the Agreement was executed in 1967. Specifically, among the contingencies which Peabody claimed changed the nature of its performance was the 1973 Arab Oil Embargo which, in turn, caused an abrupt and massive increase in the costs of mining coal.

In the Circuit Court, the trial court, Peabody introduced evidence of the amount of its loss on performance, the causes of the loss and that the 1973 Embargo was unforeseen and unforeseeable at the time of the execution of the Agreement in 1967. Over the objection of Peabody, evidence of Peabody's financial condition in 1975 and 1976, the time of the claimed breach and the trial, was received as well as evidence of Peabody's experience in production of coal, its available coal reserves and its other resources. Evidence was also received over objection that the value of Peabody's coal reserves had increased. After the Circuit Court entered judgment of specific performance, Peabody appealed to the Missouri Court of Appeals.

In its appeal, Peabody asserted that, on the basis of the only evidence in the record, it had established that, in 1967, the 1973 Arab Oil Embargo and its effect on mining costs were not foreseen or foreseeable by Peabody and Public Service when they executed the Agreement. Similarly, it asserted that, in determining whether or not performance had become commercially impracticable the Court could look only to the nature and extent of Peabody's loss suffered in performance of the Agreement under scrutiny which had been occasioned by the contingency.

Federal Question Raised by the Opinion of the Missouri Court of Appeals

A substantial Federal question was initially raised in this case by the manner in which the Missouri Court of Appeals applied Section 2-615 of the Uniform Commercial Code. In its approach to commercial impracticability under Section 2-615, the Court fastened on the evidence of Peabody's resources and its size. The Court ruled against Peabody with regard to the two issues determinative in the establishment of Peabody's defense under Section 2-615: foreseeability of the occurrence of the contingency and commercial impracticability.

With regard to commercial impracticability, the Court acknowledged that Peabody had suffered a loss on performance (Appendix A, p. A-4). However, the Court refused to find commercial impracticability, because, in the Court's view, Peabody was able to absorb the loss, saying:

> "* * * a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than to a party without them; and, the application of the doctrine [of commercial impracticability] and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, outside the strict confines of the contract itself." (Bracketed words supplied.) (Appendix A, pp. A-10-11).

In dealing with the question of foreseeability of the occurrence as an element of determining the availability of the excuse, the Court once again interjected the unrelated element of size when it said:

> ". . . the factors of Peabody's financial condition, experience in the production of coal, resources, availability of the raw material (coal reserves) and other factors . . . have a direct bearing and evidentiary value in determining the question of foreseeability of the occurrence triggering the loss." (Appendix A, p. A-10).

Peabody, in its motion for rehearing and application for transfer to the Supreme Court of Missouri, filed in the Missouri Court of Appeals, asserted that the judicial creation in the Court's opinion of one rule for large or strong sellers and one for small or weak sellers violated the provisions of both the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution (Appendix B, pp. A-19, 23). The Missouri Court of Appeals denied the motion and application without comment (Appendix E).

Peabody, in its application to the Supreme Court of Missouri for transfer, again raised the constitutional issues (Appendix C, pp. A-29-30). The Supreme Court denied the application without comment (Appendix F).

Finally, Peabody filed its motion in the Supreme Court of Missouri for that Court to suspend its rules and to permit reconsideration of its motion to transfer (Appendix D). The Supreme Court denied the motion, again without comment (Appendix G).

The Missouri Court of Appeals is the highest Court in Missouri in which a decision could be had in this case.

REASONS FOR GRANTING THE WRIT

The intentional judicial creation of separate classifications of sellers for the purpose of determining which sellers will be excused from performance because of commercial impracticability under Section 2-615 of the Uniform Commercial Code is an arbitrary and unreasonable state action, constituting a denial of equal protection of the laws and a deprivation of the property of the seller, who is not excused, without due process of law.

A. Judicial action is state action, subject to the requirements of the Fourteenth Amendment.

The fact that Peabody is not a natural person, but is a corporation, does not bar it from raising claims that it has been injured by the action of the Missouri Court of Appeals, denying to it equal protection of the law or depriving it of its property without due process of law. *Grosjean v. American Press*, 297 U.S. 233, 80 L.Ed. 660 (1936).

Both the equal protection clause and the due process clause of the Fourteenth Amendment are intended to protect persons from the effects of state action violative of either or both clauses. The fact that, in this case, Peabody's injuries occurred through a judgment and opinion of a State appellate court makes that injury no less state action for the purpose of seeking redress of such wrongs than the action of a state legislature. Thus, in *Shelley v. Kramer*, 334 U.S. 1, 20, 92 L.Ed. 1161 (1947), this Court said:

> "We have noted that previous decisions of this court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy. . . . State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to the exertions of state power in all forms and when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this court to enforce the constitutional commands."

Similarly, the fact that the injuries to Peabody arose from unreasonable action of a State appellate court in applying state legislation, which is itself neutral in content, does not prevent Peabody from raising its claims, either under the equal protection or due process clauses. In *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L.Ed. 220 (1886), this Court said:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

B. Section 2-615 of the Uniform Commercial Code treats all sellers equally.

The Missouri Court of Appeals, in holding that performance of the Agreement did not become commercially impracticable, even though Peabody performed at a staggering loss, because Peabody's resources and size indicated to it that Peabody could continue to absorb the loss, created two classes of sellers, the large and the small, for the purpose of application of Section 400.2-615, R.S.Mo. The statute itself creates no such distinction, admits of no such distinction, and indeed, treats all sellers within its terms as equal.

In essence, Section 2-615 provides to a seller an excuse for its failure to perform a contract if (1) failure was occasioned by a supervening event or contingency during performance,

(2) the occurrence of which was not reasonably within the contemplation of the parties at the time of contracting, and (3) which occurrence renders performance commercially impracticable in the sense that, in this instance, the cost of performance is materially and substantially increased. Thus, the entire focus of the inquiry under the statute is directed toward the single contract in dispute and to all sellers without distinction.

C. Commercial impracticability must be determined by looking only to the contract in question.

The ability to absorb losses in performing a contract is irrelevant in determining whether performance is impracticable under Section 2-615. In essence, however, the Missouri Court of Appeals held, not only that a seller's size bears on foreseeability of the occurrence, but also that a seller is not to be excused under Section 2-615 from performing a contract if it is of sufficient economic strength or size to absorb the loss (Appendix A, A-10-11). To the contrary, commercial impracticability must be determined by looking only to the contract itself.

In *Iowa Electric Light & Power Co. v. Atlas Corp.*, 23 UCC Rep. Serv. 1171 (U.S. N.D. Ia. 1978, on appeal to the Eighth Circuit), the Court said (l.c. 1180-1181):

> **"For purposes of analyzing this case under any of the espoused theories, the contract should normally stand alone, i.e., corporate financial conditions should be irrelevant.** However, the relationship of the contract with more recent ones entered into by Atlas at higher market prices leads the Court to the conclusion that disaster was at least partly attributable to the type of prudent business decisions which point to substantial long-term profit for Atlas Corporation's Minerals Division." (Emphasis added.)

By its latter comments, the District Court was not suggesting that the seller be required to set-off its losses against other profitable contracts. The Court was referring to the fact that, following execution of the litigated contract, the seller consciously made a business decision to change its production methods, which caused a loss on that contract, but which would insure profitability on subsequently executed contracts. There was no evidence that Peabody's loss under the Agreement was due to internal business decisions.

None of the Official Comments to Section 2-615 state or infer that a seller's financial ability to perform a contract is to be taken into consideration. Further, commentators on Section 2-615 have likewise stated that a seller's other resources are not relevant considerations. See R. Duesenberg & L. King, *Sales & Bulk Transfers under the Uniform Commercial Code*, Vol. 3A § 14.13[3] at p. 14-92 (1978):

> "The really tough issue with fitting rising costs of raw materials into a defense of impracticability is that the only burden involved is one of increased costs. The job of performing can still be accomplished, unless to do so renders the seller so financially insolvent as to put it out of business. In many cases, however, a loss from one contract will not have this result, and extremely difficult questions can arise whether a substantial loss must be borne under a contract which becomes burdensome because of unforeseen contingencies the non-occurrence of which were basic assumptions of the agreement. **To deny the seller relief because of his ability from other resources to sustain the loss however drastic it is, is a glib if not smug response.** Such an approach would, for example, place a premium on the organizational struction of the seller: is it a separate corporate organization among numerous affiliates, or is it a division or unit of a single large entity? **It is not readily apparent why the results in these cases should be be made to depend upon a factor so unrelated to the risk being allocated."** (Emphasis added.)

D. **The classifications made by the Missouri Court of Appeals are arbitrary and unreasonable because they conclusively preclude any relief to a large or strong seller, a result not within the purpose of Section 2-615 of the Uniform Commercial Code**

Peabody adopted the approach that Section 2-615 treated all sellers equally and took the position that, having established its losses under its performance of the Agreement as a threshold question, and believing that it had established all other elements of its defense, resisted efforts of Public Service to introduce evidence extraneous to the Agreement which tended to show that it could continue to perform its obligation, even though at a loss. However, the Missouri Court of Appeals, apparently construing the statute as one designed only to protect sellers from insolvency or bankruptcy caused by performance, considered evidence of Peabody's financial condition and Peabody's over-all ability to absorb the loss and found that performance had not been rendered commercially impracticable when it said:

> "* * * a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than to a party without them; . . ." (Appendix A, pp. A-10-11).

The Court thereby intentionally inserted an entirely new, and illegal, condition, size or strength, to the seller's relief under the statute.

The effect of the Court's opinion is to foreclose automatically any seller from relief if it is large enough or financially strong enough to endure the loss. If, however, the seller, otherwise within its terms, is able to fit itself into the class of the small or the weak, it will automatically be relieved of its obligation to perform if it can prove it has suffered a loss.

Insertion of a more mischievous, arbitrary and capricious rule into commercial law, the keynote of which is predictability, can scarcely be imagined. It is totally unwarranted by Section 2-615. The Court's classification has no relationship to the purpose of the statute which is to regulate the conduct of a particular seller toward a particular buyer with respect to a particular sales contract.

This Court has held many times previously that creation of classifications within the law by state legislation or by state judicial action so as to make an unjust differentiation between persons who occupy similar circumstances in the eyes of the law, burdening one class and not the other, constitutes a deprivation of property without due process of law and a denial of equal protection of law. Thus, it is a basic proposition in this Court that:

> "[Classification] 'must always rest upon some difference which bears a reasonable relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.' " *Gulf, C & S F.R. Co. v. Ellis,* 165 U.S. 150, 155, 41 L.Ed. 666, 668 (1896)

This rationale of appropriate classification is operative with regard to proceedings arising under both the due process clause and the equal protection clause of the Fourteenth Amendment.

In an early case under the Fourteenth Amendment, *Barbier v. Connelly,* 113 U.S. 27, 28 L.Ed. 923 (1885), this Court said with regard to classifications and the due process clause:

> "The 14th Amendment, in declaring that no State 'shall deprive any person of life, liberty or property . . . [requires] that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.' "

The problems created by uneven treatment of persons of the same calling, as in this instance, sellers, have also been corrected under the equal protection clause of the Fourteenth Amendment. Thus, in *Doe v. Bolton*, 410 U.S. 179, 35 L.Ed.2d 201 (1973) this Court, in striking down a state statute requiring abortions to be performed only in hospitals accredited by a joint commission, where accreditation had nothing to do with the ability of the hospital to deliver the services properly, said that:

> "We hold that the requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not 'based on differences that are reasonably related to the purposes of the act in which it is found.' *Morey v. Doud*, 354 U.S. 457, 1 L.Ed.2d 1435, 77 S.Ct. 1344 (1957) p. 214 at 410 U.S."

And, in an earlier case state legislation requiring carriers to procure insurance or give a bond, except those carrying certain specified products was stricken in *Smith v. Cahoon*, 283 U.S. 533, 75 L.Ed. 264 (1931) where this Court said:

> "But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right."

Here, the purpose of Section 2-615 is to regulate the conduct of all persons in similar circumstances: sellers. Its purpose is

not to relieve solely the small or the weak from performance of a contract that is commercially impractiable. Relief is afforded to all sellers. The judicial creation of such classification of strong versus weak in the administration of Section 2-615 goes far beyond the purpose of the statute, and as a consequence is not subject to the protection, or deference, or presumption of validity, which this Court might give state court actions taken within the purpose of a statute. Cf., *McGowan v. Maryland*, 366 U.S. 420, 425, 6 L.Ed.2d 393 (1961). In this case, the classification is ". . . wholly irrelevant to the achievement of the State's objective . . ." in enacting Section 400.2-615 R.S.Mo.

A classification of sellers entitled to relief under state sales law on the basis of their strength or weakness has no relationship to the purpose of the law. Generally, size, or financial strength, standing alone, is not an appropriate consideration in the enforcement of state contract law, even though it may, in regulatory areas, be an acceptable index of an evil, such as in the antitrust laws. Where such an index does not exist, as Mr. Justice Holmes said in *Engel v. O'Malley*, 219 U.S. 128, 138, 55 L.Ed. 128 (1911):

> " . . . the law cannot discriminate between the great and the small."

Such classifications are arbitrary and irrational when not within the purpose of the statute. *U. S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533, 37 L.Ed.2d 782 (1973). The classification made by the Missouri Court of Appeals in this case is likewise arbitrary and irrational for the same reason. Because the Court has placed Peabody in the class of the large or strong, and on that basis has denied to it the defense of excuse from performance, it has denied Peabody equal protection of the law and deprived Peabdy of its property without due process of law.

The question raised in this petition as to the proper application of Section 2-615 of the Uniform Commercial Code is of major importance not only to Peabody but to all sellers similarly situated throughout the United States and the District of Columbia where Section 2-615 is in effect. The element of unpredictability that has been introduced into the commercial law of our land by the Missouri Court of Appeals by injecting size and ability to absorb losses into a determination of commercial impracticability can only be resolved effectively by a decision of this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that Peabody's petition for a writ of certiorari be granted.

Respectfully submitted,

THOMPSON & MITCHELL
WILLIAM G. GUERRI
JOHN H. STROH
One Mercantile Center
St. Louis, Missouri 63101

DIETRICH, DAVIS, DICUS,
ROWLANDS & SCHMITT
EDWARD E. SCHMITT
1001 Dwight Building
1004 Baltimore Avenue
Kansas City, Missouri 64105

Attorneys for Petitioner
Peabody Coal Company

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APPENDIX A

In the Missouri Court of Appeals
Western District

Missouri Public Service Company,
Respondent,
vs.
Peabody Coal Company,
Appellant.
No. KCD 29,611

Appeal from the Circuit Court of Jackson County, Missouri,
Sixteenth Judicial Circuit, Division No. 14
Honorable Robert A. Meyers, Judge

OPINION

Missouri Court of Appeals, Western District

(Filed January 29, 1979)

BEFORE SHANGLER, P.J., SWOFFORD, C.J., and TURNAGE, J.

This is an appeal from a decree of specific performance involving a contract between the parties wherein the appellant (Peabody) agreed to supply the respondent (Public Service) with coal for the production of electricity at the power plants of Public Service in Jackson County, Missouri over a long term. Faced with escalating costs, Peabody unsuccessfully attempted to negotiate a higher price per ton for coal furnished under the contract, and failing in such attempts, declared its intention to discontinue coal shipments. Public Service thereupon elected to consider this position of Peabody to be an

anticipatory breach of the contract and thereafter instituted this action to require specific performance of the contract as it was written.

The resolution of this appeal depends upon the underlying basic facts concerning the contractual relationship of the parties. Public Service is a state-regulated public utility supplying electricity and serving the consumers in 28 Missouri counties. In anticipation of need for expanded capacity, it constructed a large coal burning power plant at Sibley, Missouri in Jackson County, and simultaneously undertook negotiations with several coal suppliers, including Peabody, for a 10-year coal supply agreement to meet the requirements of the plant. Letters of intent were signed in 1966 with Peabody and one other coal supplier. At that time, the supply of coal was described as a "buyers market" in which coal suppliers and natural gas companies competed vigorously for the business of energy producers.

Negotiations progressed between the parties to the point where Peabody made an offer to Public Service to supply its coal needs at the Sibley plant for a period of ten years at a base price of $5.40 per net ton, subject to certain price adjustments from time to time relating to costs of labor, taxes, compliance with government regulations, and increase in transportation costs, as reflected in railroad tariffs. Peabody's offer also contained an inflation escalator clause based upon the Consumer Price Index published by the United States Department of Labor. Public Service rejected this offer because of the price adjustment features, but negotiations continued and ultimately resulted in the drafting by Peabody of an agreement essentially the same as the original offer in the area of price adjustments except that the inflation escalator clause was changed so that it would be based upon the Industrial Commodities Index, also published by the United States Department of Labor, but unlike the Consumer Price Index, based, in large part, upon material production costs. This final agreement was formally executed by the parties on December 22, 1967.

Performance under the agreement was profitable for Peabody during the first two years of operation thereunder. Thereafter, production costs began to outpace the price adjustment features of the contract to the extent that in 1974, Peabody requested modification of the price adjustment features. Public Service rejected all proposed modifications in this area but did offer a modification to provide for an increase of $1.00 in the original cost per net ton. This proposal was rejected by Peabody.

On September 16, 1974, a meeting was held between officials of Public Service and Peabody at the Jackson County, Missouri home office of Public Service. At this meeting Public Service again flatly rejected Peabody's proposed modifications of the contract. Peabody thereupon declared that unless these proposed modifications were met, coal shipments to Public Service would cease and the contract would be considered by Peabody to be inoperative. Contact and negotiations continued during which Public Service adamantly refused to agree to the proposed modifications and declared its intentions to hold Peabody to the terms of the original contract. Peabody, by letter dated May 6, 1975, mailed from its principal office in St. Louis, Missouri, advised Public Service that upon the expiration of 60 days all coal shipments under the contract would cease, if the contract modifications were not agreed to by Public Service.

It is undisputed that Peabody possessed adequate coal supplies and ability to perform the contract. Rather, excuse from performance is claimed upon the basis of excessive economic loss under the agreement, absent modification; that excuse from performance was lawful upon the doctrine of "commercial impracticability" under Section 400.2-615 RSMo 1969.

Peabody claimed and the evidence tended to establish that the loss was occasioned largely because the escalation clause in the contract was based upon the Industrial Commodities Index

which in years prior to the execution of the contract had been an accurate measure of inflation but had ceased to be an effective measure due to the 1973 oil embargo, runaway inflation and the enactment of new and costly mine safety regulations. Public Service conceded a weakening of this significant function of the Industrial Commodities Index but introduced evidence, including admissions by Peabody, that the events bringing this about were foreseeable at the time of the execution of the contract.

Peabody introduced evidence that its losses under the contract were in excess of 3.4 million dollars at the time of the trial. Peabody's evidence showed that 60% of these claimed losses were not due to inadequacy of the price adjustment features of the contract to track inflation, but rather to reduction in price caused by lower calorific and higher waste content of the coal received than that originally contemplated under the terms of the contract. It is apparently not disputed that had the escalation clause been based upon the Consumer Price Index, Peabody's purported losses would have been substantially reduced.

That Peabody sustained loss under the contract seems clear, although the extent and cause thereof was in sharp dispute. Public Service, over objection, was permitted to show that since performance of the contract began, Peabody had experienced an approximate three-fold increase in the value of its coal reserves, presumably brought about by the same inflationary trend and other causes to which it ascribes its loss under the contract.

This cause was tried without a jury and the court entered its decree of specific performance, from which judgment Peabody appealed. Under such circumstances, the judgment must be affirmed unless there is no substantial evidence to support it, or it is against the weight of the evidence, or erroneously declares or applies the law. Rule 73.01; Murphy v. Carron, 536 S.W.2d 30, 32 [1] (Mo. banc 1976). The issues upon this appeal are essentially legal in nature, and are, in part or least, issues of first impression in Missouri. These legal issues are governed by the terms and provisions of Chapter 400, Uniform Commercial Code, RSMo 1969 (effective July 1, 1965) (U.C.C.) and in force at the time of the execution of the sales contract here involved.

At the outset, the position of Peabody as to venue in this case must be resolved. Peabody asserts that the Circuit Court of Jackson County was an improper venue for the institution of this action since it was neither present in that county nor did it breach its contract with Public Service in that county. Section 508.040 RSMo 1969. The trial court found, however, that Peabody had been guilty of an anticipatory breach of its contract with Public Service at the September 16, 1974 meeting of officials of both companies held in Jackson County, Missouri, and by reason thereof the venue was proper.

The decisional law of Missouri has long recognized the doctrine of anticipatory repudiation. Eddington v. Cockrell, 221 Mo. App. 52, 286 S.W. 405, 406 [2] (1926); Ewing v. Miller, 335 S.W.2d 154, 158 [6] (Mo. 1955) and cases cited therein. Section 400.2-610 RSMo 1969 (U.C.C.) gives this doctrine statutory definition and provides, in part:

> "Anticipatory repudiation
>
> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> (Here the statute sets out the options available to the injured party.)

* * * * * * *

The comments accompanying this section further elaborate on this definition by stating that anticipatory repudiation "centers upon an overt communication of intention" which demonstrates "a clear determination not to continue with performance". There was ample competent evidence to support the trial court's finding that this repudiation of the contract within these definitions occurred at the meeting of September 16, 1974, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses as to what occurred at that meeting where the testimony conflicted. Rule 73.01.3(b).

Peabody's assertion that the breach of its contract, if any, occurred in St. Louis upon posting of the May 6, 1975 letter under the so-called "mail box rule" is not persuasive. Under Section 400.2-610, supra, where an anticipatory repudiation occurs, the party whose contract has thus been breached may wait a commercially reasonable time for the offending party to perform the contract or retract the repudiation thereof. It is reasonable to conclude that the letter of May 6, 1975 was nothing more than a confirmation that Peabody had no intention of performance of the contract or retraction of its earlier repudiation.

Further, it should be noted that U.C.C. gives the party injured by the breach a clear option to sue in specific performance, which Public Service chose to do. Section 400.2-610(b); Section 400.2-711(2)(b); Section 400.2-716. Both the form of action and the venue were proper under the facts in this case.

Nevertheless, Peabody strongly urges, as a ground for reversal of the decree, that the court erred in entering the decree because Public Service acted in bad faith in its refusal to accede to a price modifiation of the contract and thus Public Service breached the contract. In so doing, Peabody relies upon the U.C.C. provisions imposing the obligation of good faith upon both buyer and seller as an inherent part of all contracts for

the sale of goods. Section 400.1-203 under General Provisions of U.C.C. provides:

> "Obligation of good faith
>
> Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement."

Section 400.2-103(1)(b) under the provisions of U.C.C. relating to Sales, it is provided in part:

> "Definitions and index of definitions
>
> * * * * * * *
>
> 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
>
> * * * * * * *"

Such good faith, honesty and adherence to commercial or business standards are also inherent in the right to maintain an equitable action for specific performance of a contract as in the case at bar. There is no evidence or present claim that Public Service acted in any particular outside the boundaries thus imposed in the original negotiations, offer and counter-offers and final execution of the sales contract here in question nor in the performance of the obligations thereunder preceding the breach by repudiation. Peabody's charge is based entirely upon the refusal of Public Service to accede to Peabody's demands for price modification, which refusal, it asserts, constituted bad faith and thus placed the onus of breach upon Public Service. Neither the law of contracts generally nor the terms of U.C.C. relied upon by Peabody lend support to this theory. The contract here involved was settled as a result of arm's length dealing with no cloud of dishonesty, lack of good faith or failure to adhere to standard business or commercial practice upon the part of either party. The fact that foreseeable

economic trends or developments resulted in loss of anticipated profits or, as here claimed, actual financial loss, does not prevent Public Service from refusal of a modification of price and to take advantage of a good bargain. Such is particularly true here, for the reason that Public Service is a utility impressed with public interest and any increase in its cost in producing electricity would reflect in its rates to its public and private consumers. For this reason, its good faith, if it had agreed to a gratuitous modification upward of its costs, might properly be called into question. Indeed, in the case of U. S. for the Use and Benefit of Crane Co. v. Progressive Enterprises, Inc., 418 F. Supp. 662 (E.D. Va. 1976), strongly relied upon by Peabody, the court held in similar circumstances that the purchaser "possessed the contractual right to refuse to modify and to demand performance on the original terms" (at l.c. 664). Where an enforceable, untainted contract exists, refusing modification of price and seeking specific performance of valid covenants does not constitute bad faith or breach of contract, and the trial court properly so held.

The appellant's final allegation of error is that the trial court erred in refusing to relieve or excuse it from its obligations under the contract upon the basis of "commercial impracticability" under Section 400.2-615 RSMo 1969 (U.C.C.), which section reads, in part:

> "Excuse by failure of presupposed conditions
>
> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c)[1] is

[1] Subparagraphs (b) and (c) cover situations where a seller's capacity to perform the contract is only partially impaired and for allocation of his curtailed production among all of his customers and notice to the buyers. These provisions are not applicable here.

> not a breach of his duty under a contract for sale **if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made** or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> * * * * * * *"
>
> (Emphasis supplied)

The comments accompanying this section treat it as dealing with the doctrine of "commercial impracticability" and central to this concept is that the doctrine may be applicable upon the occurrence of a supervening, unforeseen event not within the reasonable contemplation of the parties at the time the contract was made. Such occurrence must go to the heart of the contract.

Further light is shed upon the provisions of Section 400.2-615, in Comment No. 4, accompanying that section, which states:

> "4. **Increased cost alone does not excuse performance** unless the rise in cost is due to some unforeseen contingency which alters **the essential nature of the performance.** Neither is a rise or collapse in the market in itself a justification, **for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.** But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section." (Emphasis added)

In the case of Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 [3] (D. Col. Cir. 1966) the court articulates the ingredients necessary to establish the claim of "commercial impracticability" as (1) the occurrence of a contingency; (2) the nonoccurrence of which was a *basic assumption* upon which the contract was made; and (3) by which occurrence further performance has become commercially impracticable. The fact that the statute is drawn in such general terms is to provide flexibility in its application and full scope for the application of equitable principles and considerations with which the doctrine of commercial impracticability is imbued, as recognized in the Transatlantic Financing Corp. decision, supra. When so viewed and applied, a wide variety of commercial situations often unique to the particular case under consideration are subject to scrutiny. This is particularly true in a case such as the one at bar, where the claim of commercial impracticability is based primarily upon the fact that the performance of the contract results in great financial loss to Peabody due to increase in cost of production (due to the causes enumerated) which were not foreseeable at the time the contract was made. In this connection, Peabody argues that in the resolution of this issue, only the contract in litigation should be considered by the court and that the factors of Peabody's financial condition, experience in the production of coal, resources, availability of the raw material (coal reserves) and other factors should be disregarded. This argument is without merit and Peabody cites no authority in support thereof. Those factors have a direct bearing and evidentiary value in determining the question of foreseeability of the occurrence triggering the loss. See e.g. Eastern Airlines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975). A commercial, governmental or business trend affecting a contract's value which would be foreseeable to a party with wide experience and knowledge in the field and, perhaps, not to a party with less; a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than

to a party without them; and, the application of the doctrine and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, outside the strict confines of the contract itself.

Further, the trial court is put upon inquiry and finding (under the statute) that the nonoccurrence of the event was a "basic assumption on which the contract was made" and that the occurrence of such event "alters the essential nature of the performance thereunder." See: Eastern Airlines v. Gulf Oil Corp., supra; United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966); Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974); 6 Corbin on Contracts, Section 1333 (Rev. Ed. 1962); 6 Williston on Contracts, Section 1952 (Rev. Ed. 1938).

A recent case which is strikingly similar to the case at bar is Iowa Electric Light & Power Co. v. Atlas Corporation, 23 U.C.C. Rep. Service (U.S., N.D. Iowa 5/4/78). In that case, the Iowa Electric entered into a contract in 1973 whereby it was to purchase appproximately 700,000 pounds of uranium concentrate from Atlas, at a beginning price per pound of $7.10, over an extended period for use in the production of electric energy. The contract contained an escalation clause providing for an automatic inflationary price per pound increase of $0.-12329 cents per day or 3¾% per month on July 15th of each year so that the contract price by 1978 would be approximately $8.45 per pound. Because of late deliveries, Iowa Electric by way of a proceeding in injunction, in the nature of specific performance, sought to insure deliveries under the terms and at the price established in the contract, and Atlas counterclaimed seeking to reform the contract by judicial decree so as to provide a higher price per pound for the product upon the basis of commercial impracticability. The case was tried upon the counterclaim by stipulation of the parties and the court denied Atlas the relief sought and dismissed its counterclaim.

The basis upon which Atlas sought relief was that unforeseen factors had so drastically increased its costs and resulted in burdensome losses amounting to approximately $1,800,000.00 in 1976 and projected to losses of approximately $4,000,000.00 in fiscal years 1977-1979. Atlas attributed the increase in its costs to the Arab Oil embargo and OPEC cartel, unexpected federal environmental and occupational safety regulations, inflation in wages and costs of chemicals and equipment, and certain uranium market conditions. Atlas produced evidence that its costs had increased to $17.40 per pound and that the open market price per pound in 1977 was $43.00 per pound. The court held, among other things:

(1) That the term " 'impracticable' as used in U.C.C. § 2-615 does not mean impossible and each situation should be viewed in the context of reasonable commercial relationships"; that "Atlas must show that the increase is more than onerous or expensive and that it had no part in stimulating that increase"; and that the "burden of proving each element of impracticability is on the party claiming excuse".

(2) That, although some of the factors which resulted in the increased cost of production may have been unforeseen and the total impact was not contemplated by the parties during contract negotiations, prior to contract there was good reason to anticipate rising costs and drastically increased expense arising from inflation and governmental environmental and safety regulations.

(3) It was not clear that Atlas was not in a position to protect itself contractually from some of the risks; that some of the increased costs resulted from internal corporate decisions; and, that increased costs were partially due to rise in the market price of uranium, the fact that Atlas' reserve in Alkaline ores used in processing uranium were rapidly becoming exhausted, facts known to Atlas at the time the contract was negotiated.

The court in *Iowa Electric* refused to reform the contract principally upon the basis of the failure of Atlas to sustain its burden of proof to establish "commercial impracticability", but the facts there are so similar the case stands for an acceptable precedent in the case at bar.

It should again be emphasized that in the negotiations leading to the contract now before this Court an escalator clause was agreed upon to cover the contingencies of increase in Peabody's costs due to wages reflected by labor contracts; payments for unemployment, social security taxes and Workmen's Compensation insurance premiums; costs of compliance with federal, state and local laws, regulations or orders; railroad tariffs; and, increase in the costs of material and supplies, explosives, electric power and administrative and supervisory expense based upon the Industrial Commodities Index of the Department of Labor. There is no evidence nor, indeed, serious claim, that Public Service did not abide by the letter of these provisions, and in addition, prior to suit, agreed to a further price increase of $1.00 per net ton, which Peabody rejected.

The facts as shown by the record lead to the conclusion that at least some of the loss resulted from the fact that for some unexplained reason the Industrial Commodities Index lagged behind the Consumer Price Index, the measuring factor first proposed by Peabody, in reflecting inflationary cost increases. That such indexes were based upon different commercial and economic factors was presumably known by both parties since each was skilled and experienced in those areas and the divergence between the indexes could not be said to be unforeseeable. Be that as it may, Peabody agreed to the use of the Industrial Commodities Index factor.

The other claim made by Peabody alleged to bring it within the doctrine of "commercial impracticability", is the Arab oil embargo. Such a possibility was common knowledge and had been thoroughly discussed and recognized for many years by our government, media economists and business, and the fact that the embargo was imposed during the term of the contract here involved was foreseeable. Peabody failed to demonstrate that this embargo affected its ability to secure oil or petroleum products necessary to its mining production albeit at inflated cost. In fact, as previously stated, this embargo can reasonably be said to have, at least indirectly, contributed to the marked appreciation to the value of Peabody's coal reserves by forcing the market value of that alternative source of energy upward in this country.

It is apparent that Peabody did make a bad bargain and an unprofitable one under its contract with Public Service resulting in a loss, the cause and size of which is disputed. But this fact alone does not deal with either the "basic assumption" on which the contract was negotiated or alter the "essential nature of the performance" thereunder so as to constitute "commercial impracticability". The court below properly decreed specific performance.

The judgment is affirmed.

.....

Ben W. Swofford, Chief Judge

All concur.

APPENDIX B

In the Missouri Court of Appeals
Western District

Missouri Public Service Company,
Respondent,
v.
Peabody Coal Company,
Appellant.
KCD No. 29,611

Appeal from the Circuit Court of Jackson County, Missouri
Division 14
Honorable Robert A. Meyers, Judge

Motion of Appellant, Peabody Coal Company, for a Rehearing or, in the Alternative, Application to Transfer to the Supreme Court of Missouri and Suggestions in Support Thereof

(Filed February 13, 1979)

Comes now Appellant, Peabody Coal Company ("Peabody"), and moves the Court to set aside and vacate the opinion and judgment of the Court rendered and filed herein on January 29, 1979, and to grant Peabody a rehearing herein or, in the alternative, to transfer this cause to the Supreme Court of Missouri.

I. Motion for rehearing

Peabody moves the Court for a rehearing, pursuant to Rule 84.17, Mo. R.C.P., for the reason that the Court has overlooked

or mistinterpreted the following material matters of law and fact:

A. The Court's approach to the question of whether or not the contingencies affecting Peabody's performance were foreseeable is in direct conflict with the proper line of inquiry regarding whether the occurrence of such contingencies were "reasonably within the contemplation of the parties at the time of contracting" adopted by the Missouri Court of Appeals, Eastern District, *Howard v. Nicholson*, 556 S.W.2d 477 (1977), a decision overlooked or ignored in this Court's opinion.

B. The Court erred in concluding that the possibility of the occurrence of the Arab Oil Embargo in 1973 was common knowledge and foreseeable in 1967 (p. 16) in the face of the uncontradicted evidence that the Embargo was not, in 1967, either foreseen or foreseeable (R. 625-626). Further, the proper subject of inquiry was whether or not it was within the reasonable contemplation of the parties at the time of contracting.

C. The Court erred in concluding that Peabody assumed the risk that escalations based on the Industrial Commodities Index would not adequately compensate Peabody for future increases of costs of materials and supplies in the face of uncontroverted evidence of both parties that each assumed that the Index would be a "fair" and "accurate" measure of future increased costs of materials and supplies (Tr. 346, 357, 444). This conclusion is also contradicted by the Court's own finding that the Index in years prior to execution of the Agreement had been an accurate measure of materials and supplies costs (p. 4).

D. The Court misapplied § 2-615 of the Uniform Commercial Code (§ 400.2-615, R.S.Mo. 1969) when it held it proper to consider Peabody's size in determining whether the loss suffered by Peabody rendered its performance commercially im-

practicable. Such a conclusion is in conflict with a decision which this Court described as "strikingly similar to the case at bar" and as "an acceptable precedent in the case at bar," *Iowa Electric Light & Power Co. v. Atlas Corp.*, 23 UCC Rep. Serv. 1171 (U.S.D.C.N.D. Ia. 1978), and the Court's conclusion appears based, in part, on its misinterpretation of *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429 (S.D. Fla. 1975).

E. The Court erred in concluding *Iowa Electric Power* as an "acceptable precedent" for the reason that in that case there was evidence that increased costs of production were due to seller's decisions changing the method of production, and seller failed to sustain its burden of proving how much of the increase in costs were not the result of its own actions. The uncontradicted evidence in this case is that the increase in costs of production resulted totally from external causes beyond Peabody's control and not reasonably within the contemplation of the contracting parties, i.e., excessive increases in costs of supplies and materials, due to their scarcity occasioned by the Embargo, which grossly outdistanced rises in the Industrial Commodities Index (Tr. 624-626).

F. The Court erred in concluding that the "cause and size" of Peabody's loss under the Coal Supply Agreement "is disputed," (p. 16) in that the size of the loss ($3,020,019 without BTU adjustments and $1,223,574 with BTU adjustments) was never in dispute, and the uncontradicted evidence was that Peabody's loss was caused by increased mining costs that were not recoverable under the price escalation provisions of the Agreement.

G. The Court misinterpreted the facts and the function of the Consumer Price Index initially proposed for use by Peabody as one of sixteen contract escalators as evidenced by its conclusion that "It is apparently not disputed that had the escalation clause been based upon the Consumer Price Index, Peabody's

purported losses would have been substantially reduced" (pp. 4-5). The proposed inflation-deflation clause based on the Consumer Price Index was never intended to deal with increased mining costs to Peabody. These costs were originally to be dealt with by fifteen other adjustments in accordance with fluctuations in unit costs of supplies and the like. The purpose of the proposed inflation-deflation clause was, according to uncontradicted evidence, to protect the purchasing power of the profits earned by Peabody (Tr. 627, 635-636). Inclusion of this clause would not have had any substantial effect on reduction of Peabody's losses due to increased mining costs.

H. The Court in concluding that Service acted in good faith and consistent with reasonable commercial standards looked only to Service's conduct at the time of execution of the Agreement. The Court ignored Comment 6 to § 400.2-615 which directs the Court's inquiry to Service's conduct at the time at which Peabody claimed impracticability. Comment 6 envisions the "necessity" of a price adjustment in a situation of impracticability in the light of the good faith requirements of § 400.1-203 and the policy of the UCC "to use standards of equitable principles in furtherance of commercial standards and good faith."

I. With regard to the venue question, the Court overlooked or ignored the activities of each party which occurred between September 16, 1974, the date the Court finds an anticipatory breach by Peabody, and May 6, 1975, the date of termination of the Coal Supply Agreement by Peabody, which facts, as a matter of law, negate or retract any repudiation of the Agreement by Peabody on September 16, 1974.

II. Application to transfer

In the alternative, Peabody applies for transfer of this case to the Supreme Court of Missouri, pursuant to Rule 83.02, Mo. R.C.P., for the following reasons:

A. This case is of general interest and importance in the State of Missouri in that it is a case of first impression arising under § 400.2-615, R.S.Mo. 1969, and a definitive ruling by the Missouri Supreme Court is required with respect to the doctrine of "commercial impracticability" as codified in said legislation.

B. The opinion of this Court with regard to the determination of foreseeability is contrary to *Howard v. Nicholson*, 556 S.W.2d 477 (Mo.App. E.D. 1977) and § 400.2-615, R.S.Mo. 1969, and a re-examination of existing Missouri law on this issue and a definitive ruling by the Missouri Supreme Court with respect thereto is required.

C. The opinion of this Court which places great emphasis on the size of Peabody (pp. 5, 11-12) is in conflict with the law of Missouri in that it judicially creates one rule of law for large companies and another for small companies in contrast with the statutory language. Such distinction violates the Equal Protection and Due Process of Law Clauses of both the United States and Missouri Constitutions, 14th Amendment, Art. I, Sections 2 and 10, respectively. This issue is one of general interest and importance in Missouri and requires a re-examination of the law of Missouri and a definitive ruling by the Missouri Supreme Court witth respect thereto.

D. The opinion of this Court with regard to venue and anticipatory breach is in conflict with the decision of the Court in *Taussig v. Southern Mill & Land Co.*, 124 Mo. App. 209, 101 S.W. 602 (1907), and §§ 400.2-610, 400.2-611 and 508.040, R.S.Mo. 1969, as well as the law with respect to negation and repudiation of an anticipatory breach. A re-examination of existing Missouri law on these issues and a definitive ruling by the Missouri Supreme Court with respect thereto is required.

On the grounds and for the reasons stated, Peabody respectfully asks for a rehearing or, in the alternative, for transfer to the Supreme Court of Missouri.

I. Suggestions in Support of Motion for Rehearing

Peabody's case on the merits was that its performance had become impracticable because the price escalation provisions of the Agreement had failed to allow it to recover its costs. This failure was due to the Arab Oil Embargo which caused these costs to increase more sharply than increases in the Index on which price escalations operated.

A. The Court's approach to the question of whether the contingencies affecting Peabody's performance were contemplated was in error. After the adoption of § 400.2-615, R.S.Mo. 1969, and the decision in *Howard v. Nicholson*, 556 S.W.2d 477 (Mo. App. E.D. 1977), the Court is required to put itself in the place of the parties at the time of contracting and determine whether the occurrence of the event, not the possibility of the event itself, was "reasonably within the contemplation of the parties at the time of contracting," (l.c. 483). There is no evidence in the record that, in 1967, the Arab Oil Embargo which occurred in 1973 and its effect on the costs of mining was foreseeable. Rather, there is uncontradicted evidence to the contrary (R. 625-626). There is also in the record uncontradicted evidence that the accelerated increase in costs of materials and supplies commencing in 1973 was directly attributable to the Embargo (R. 624).

B. The Court erred when it concluded that Peabody assumed the risk that the Industrial Commodities Index would adequately reflect Peabody's increased costs. It is significant from the evidence of both parties that they considered the Industrial Commodities Index in 1967 to be a fair and accurate measure of changes in costs of mining (Tr. 346, 357, 444). The parties had, therefore, agreed, by choosing an indicator for escalation of costs that neither of them would bear the risk for the changes in cost which they reasonably contemplated. What neither party contemplated in 1967 was that, due to the Embargo, the Index would no longer be an accurate indicator of

changes in such costs. Neither party foresaw that the Index would fail its intended purpose, and because neither of them foresaw it, neither of them assumed this risk. The Court erroneously concluded that the Consumer Price Index had been proposed by Peabody to escalate the price of coal for changes in such costs, when in fact, its purpose was to preserve the purchasing power of Peabody's profits (Tr. 627, 635-636). Inclusion of this clause would not have had any substantial effect on reduction of Peabody's loss.

C. This case is unlike the case upon which this Court erroneously placed great reliance. In *Iowa Electric Light & Power Co. v. Atlas Corp.*, 23 UCC Rep. Serv. 1171 (U.S.D.C. N.D. Ia. 1978), the Court based its decision for the buyer on the failure of the seller to quantify and establish the amount of the loss caused by the external factors, the risk of which it did not assume, when it had also suffered losses from internal factors which it foresaw or controlled. Peabody proved that it suffered a loss and traced its loss to wholly external factors which it did not control and the risk of which it did not assume. Peabody established the cause of its loss, the failure of the Index due to the Embargo, and the amount of the loss, $3,020,019 without BTU adjustments or $1,233,574 with BTU adjustments.

D. The Court erred in considering the size of Peabody in determining whether performance by Peabody was commercially impracticable (pp. 5, 11-12). Support for the proposition that impracticability is to be determined in terms of loss suffered on the particular contract in question irrespective of size is the *Iowa Electric* case, supra, cited by this Court as an "acceptable precedent." In *Iowa Electric*, the Court held that "For purposes of analyzing this case under any of the espoused theories, the contract should normally stand alone, i.e., corporate financial condition should be irrelevant." Further, this Court misinterprets *Eastern Airlines, Inc. v. Gulf Oil Corp.*,

415 F. Supp. 429 (S.D. Fla. 1975), to the extent that the Court cites the decision as a precedent for considering the profitability of a company as a whole as relevant to commercial impracticability. In *Eastern*, the seller admitted its inability to separate its actual costs of performance from its intra-company profits under the contract from which it sought excuse and as a result the intra-company profits of the seller were interjected into the case. There is no failure of proof in the instant case.

(See discussion of the Court's errors regarding venue under Part II.D at page 5).

II. Suggestions in Support of Application to Transfer

Peabody makes the following Suggestions in Support of its Application to Transfer this case to the Supreme Court of Missouri:

A. The interpretation of the doctrine of "commercial impracticability" presented in this case is clearly an issue of general interest and importance in Missouri. Prior to the enactment of the Uniform Commercial Code, and specifically § 400.2-615, R.S.Mo. 1969, Missouri appellate courts had on several occasions dealt with the doctrine of common law "impossibility." Further, there has been a recent Missouri appellate court case involving the clearly relevant doctrine of "commercial frustration," *Howard v. Nicholson*, 556 S.W.2d 477 (Mo. App. E.D. 1977). The present case, however, is the first case before the Missouri appellate courts which squarely presents the issue of "commercial impracticability" as codified in § 400.2-615. The question before the Court is the extent to which the legislative mandate effects a change in prior law. The law set out in § 400.2-615 affects every commercial sales contract entered into in this State. Thus, its proper interpretation is of great general interest and importance to the business community. A definitive ruling is required by the Supreme

Court of Missouri with regard to the extent to which the doctrine of commercial impracticability is applicable, the conditions under which it may be invoked, and the manner in which it should be applied by the Courts. This case presents all of the facts and issues required to make such a definitive interpretation.

B. The opinion of this Court is contrary to a previous decision of the Missouri Court of Appeals, Eastern District, *Howard v. Nicholson*, supra, and a re-examination of the law of Missouri is required by the Supreme Court of Missouri. In *Howard*, the Court considered the concept of commercial frustration, which concept is closely allied to the concept of commercial impracticability involved in the present case. These concepts are related primarily through the applicability of the common element of foreseeability. There is an irreconcilable conflict between the approach taken in *Howard* and the approach taken here with regard to foreseeability. In *Howard*, the Court focused its inquiry on the issue of whether the occurrence of the contingency was "reasonably within the contemplation of the parties at the time of contracting." Here, the Court directed its inquiry to the question of whether or not the contingency, in the abstract, was foreseeable, or restated, whether or not Peabody, the seller, should have foreseen it.

C. An element in the lawsuit which was adverted to more than once by the Court and to which the Court appeared to attach great significance was that Peabody was a large company (pp. 5, 11-12). As such, the Court held that Peabody should have foreseen the contingencies which affected its performance and should have been able to endure the burden of the losses occasioned by performance of the Agreement. This approach introduces an element of unpredictability into commercial law. In addition, this Court's approach is contrary to the most basic doctrine of common law, that one rule of law is applicable to all. The decision creates two rules of law: one for large sellers

and one for small. Beyond the difficulties inherent in applying the two rules, Peabody submits that such a distinction violates the Equal Protection and Due Process Clauses of both the United States and Missouri Constitutions, 14th Amendment, Art. I, Sections 2 and 10, respectively.

D. With respect to venue, the Court found an anticipatory breach of the Agreement by Peabody at the meeting in Jackson County, Missouri on September 16, 1974. In so finding, the Court overlooked or ignored the facts from that date to May 6, 1975, the date of termination of the Coal Supply Agreement by Peabody. Those facts are so wholly inconsistent with the claimed anticipatory breach as to negate any such breach or operate to retract any such anticipatory breach as a matter of law. The sole evidence of anticipatory breach was the testimony of Mr. Green that Mr. Veskerna of Peabody stated that if Peabody did not get a price increase from Service, it would shut down the Rogers County mines and stop delivery of coal (Tr. 34). The Court failed to consider, among other things, Peabody's uninterrupted delivery of coal to Service under the Agreement to July 1, 1975, a nine-month period; an actual increase in Service's stockpile after September 16, 1974; Service's unequivocal acceptance of Peabody's performance without any demand from Service; and Service's failure to notify anyone of the claimed anticipatory breach (App. Br. pp. 83-88). These facts fail, as a matter of law, to demonstrate "a clear determination not to continue with performance" which the Court recognized as required as appears from the comments to § 400.2-610, R.S.Mo. Section 400.2-611, R.S.Mo. 1969, gave Peabody the right to retract any claimed anticipatory breach at any time before Service changed its position or otherwise indicated that it considered the repudiation final. Peabody's performance and Service's acceptance of performance amounted to a retraction as a matter of law. Finally, the opinion of the Court is in conflict with the decision of the Court in *Taussig*

v. Southern Mill & Land Co., 124 Mo. App. 209, 101 S.W. 602 (1907) which does not permit a party, like Service in this case, to accept performance, perform himself, and then turn around and claim anticipatory breach.

On the grounds and for the reasons stated, Peabody respectfully asks for a rehearing or, in the alternative, for transfer to the Supreme Court of Missouri.

THOMPSON & MITCHELL
/s/ WILLIAM G. GUERRI
(Mo. Bar Reg. 13568)
EDWIN D. AKERS, JR.
(Mo. Bar Reg. 17849)
JOHN H. STROH
(Mo. Bar Reg. 17085)
One Mercantile Center
St. Louis, Missouri 63101
314-231-7676

DIETRICH, DAVIS, DICUS, ROWLANDS & SCHMITT
/s/ EDWARD E. SCHMITT
(Mo. Bar Reg. 14835)
1004 Baltimore Avenue
Kansas City, Missouri 64105
816-221-3420

Attorneys for Appellant Peabody Coal Company

APPENDIX C

In the Supreme Court of Missouri

Missouri Public Service Company,
Plaintiff-Respondent,
vs.
Peabody Coal Company,
Defendant-Appellant.
No. 61294

Appeal from the Circuit Court of Jackson County, Missouri
Division 14
Honorable Robert A. Meyers, Judge

APPLICATION OF APPELLANT,

Peabody Coal Company, to Transfer to the Supreme Court of Missouri and Suggestions in Support Thereof

(Filed March 13, 1979)

Comes now Appellant, Peabody Coal Company (Peabody), and, pursuant to Rule 83.03 Mo.R.C.P., applies for a transfer of this case to the Supreme Court of Missouri from the Missouri Court of Appeals, Western District.

INTRODUCTORY STATEMENT

This appeal arises out of an action for specific performance of a long term coal supply agreement dated December 22, 1967, between Peabody and Missouri Public Service Company (Public Service), an electric utility in the Kansas City area. Due

to rapidly increasing costs for mining materials, following the onset of the Arab Oil Embargo in 1973, Peabody's losses under the Agreement through May, 1976 were $3,020,019. Peabody attempted to negotiate with Public Service for a higher price per ton than that provided under the Agreement. Public Service refused to grant price relief, and by letter dated May 6, 1975 and mailed from St. Louis, Peabody advised Public Service that the Agreement was terminated, effective July 6, 1975, for the reason that performance of the Agreement had become commercially impracticable. Peabody offered to continue to supply coal after termination at a higher price per ton than provided for by the Agreement.

On May 23, 1975, Public Service filed suit for specific performance of the Agreement and for damages in the Circuit Court of Jackson County. Public Service's original petition alleged that Peabody breached the Agreement by its letter of May 6, 1975. Peabody challenged venue in Jackson County on the basis that the letter, having been mailed from St. Louis, established venue in St. Louis. Thereupon, Public Service amended its petition to allege that Peabody anticipatorily breached the Agreement at a meeting in Kansas City on September 16, 1974. Peabody's challenge to venue was rejected, and the Circuit Court granted Public Service a temporary restraining order and preliminary injunction requiring Peabody to deliver coal under the Agreement until a trial on the merits. After a trial on the issue of specific performance only, the Circuit Court entered a judgment that Peabody specifically perform the Agreement. On appeal by Peabody to the Missouri Court of Appeals, Western District, the judgment was affirmed in an opinion filed on January 29, 1979. Peabody's motion for a rehearing or transfer to this Court was denied on February 26, 1979.

Peabody's case on the merits was that performance of the Agreement had become commercially impracticable within the

meaning of Section 400.2-615, R.S.Mo. 1969, because the price escalation provisions of the Agreement had failed to allow it to recover its costs. This failure was due to the 1973 Arab Oil Embargo which caused certain mining costs to increase more sharply than increases in the Industrial Commodities Index on which price escalation provisions of the Agreement operated.

Peabody's case on venue was that proper venue was in St. Louis where the letter of May 6, 1975, was mailed. No anticipatory breach occurred at the meeting of September 16, 1974 in Kansas City. If there was such an anticipatory breach, the acts of both Peabody and Public Service after September 16, 1974 negated or retracted any such anticipatory breach as a matter of law.

REASONS FOR TRANSFER

As more fully set forth in the accompanying Suggestions, the reasons for transfer to this Court are as follows:

A. A question of major general interest and importance regarding commercial impracticability under the Uniform Commercial Code is presented in this case to the Missouri Appellate Courts for the first time

As acknowledged by the Court of Appeals in its opinion this case involves issues of first impression in Missouri concerning the interpretation to be given to Section 400.2-615, R.S.Mo. 1969, the Uniform Commercial Code ("Section 2-615"). The Code is now in effect in 49 states, and it was in effect in Missouri when the Coal Supply Agreement involved in this case was executed. Section 2-615 excuses a party from performance of a contract on account of commercial impracticability. Section 2-615 is applicable to every commercial sales contract of goods entered into in this State. Thus, the proper interpretation of Section

2-615 is of major general interest and importance, and requires a definitive ruling by this Court.

B. The opinion filed is contrary to a previous opinion of the Missouri Court of Appeals, Eastern District, on the issue of "foreseeability," a critical element in the applicability of commercial impracticability

The approach taken in the opinion of the Court of Appeals was to question whether or not the contingency which rendered Peabody's performance impracticable should have been foreseen by it. This approach is in direct conflict with the proper line of inquiry which seeks to determine whether or not the occurrence of such contingency was "reasonably within the contemplation of the parties at the time of contracting" adopted by the Missouri Court of Appeals, Eastern District, *Howard v. Nicholson*, 556 S.W.2d 477 (1977). The Court in the instant case directed its inquiry to the question of whether or not Peabody, the seller, ought to be held to have foreseen the contingency, the 1973 Arab Oil Embargo, at the time of contracting in 1967, whether or not it did so in fact.

Although the *Howard* case was emphasized to the Court of Appeals in Peabody's main and reply briefs and in Peabody's motion for rehearing or transfer, the Court totally ignored it.

It is important to the interpretation of Section 2-615 that the conflict and inconsistencies between the two Courts' decisions be resolved by this Court.

C. The distinctions made by the Court of Appeals between large and small companies in determining commercial impracticability is contrary to Section 2-615, and a re-examination of existing law is required

The opinion of the Court of Appeals places great emphasis on the size of Peabody (pp. 5, 11-12) both in determining whether Peabody ought to have foreseen the Arab Oil Embargo and whether it could absorb the loss. This is directly contrary to the language of Section 2-615 which is of universal application. By so ruling the Court has created one rule of law for large companies and one for the small, in conflict with the statute. Such classification inserts an element of unpredictability into commercial law. It further violates the Equal Protection and Due Process of Law Clauses of both the United States and Missouri Constitutions, 14th Amendment, Art. I, Section 2 and 10, respectively. In *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533, 37 L.Ed.2d 782, 787 (1973), the Court held that a classification of persons into groups which was not related to the purpose of the statute is irrational and constitutes a denial of equal protection under the law to the group so disadvantaged. The irrational judicial classification by the Court of Appeals, giving relief under Section 2-615 only to those companies not able to absorb losses, denies to Peabody equal protection under the law.

D. **The opinion of the Court of Appeals with regard to venue is contrary to previous decisions of the Missouri Appellate Courts and a re-examination of existing law is required**

The opinion of the Missouri Court of Appeals in finding venue in Jackson County held that Peabody repudiated the Agreement on September 16, 1974, at a meeting in Kansas City, and totally ignored the uncontroverted evidence of the activities of Peabody and Public Service thereafter which, as a matter of law, either negate or retract any prior repudiation of the agreement. The opinion is in conflict with the decision of

the Court in *Taussig v. Southern Mill & Land Co.*, 124 Mo. App. 209, 101 S.W. 602 (1907), and with Sections 400.2-610 and 400.2-611, R.S.Mo. 1969, which do not permit a party, as Public Service did in this case, to accept performance, perform itself for a period of eight months, and then retroactively claim anticipatory breach. A re-examination of existing law on these issues and a definitive ruling by this Court with respect thereto are required.

This Application is accompanied by the Suggestions in support hereof and by a copy of the opinion of the Court of Appeals (Exhibit A), and motion for rehearing or transfer filed by Peabody in the Court of Appeals (Exhibit B).

For the reasons stated, Peabody respectfully asks for transfer to this Court.

SUGGESTIONS IN SUPPORT OF APPLICATION TO TRANSFER

A. This case of first impression is of major general interest and importance

The interpretation of the doctrine of commercial impracticability presented in this case is clearly an issue of major general interest and importance in Missouri. Prior to the enactment of the Uniform Commercial Code, Missouri appellate courts had on several occasions dealt with the doctrine of common law "impossibility" which was specifically changed by Section 2-615. The present case is the first case before the Missouri appellate courts which squarely presents the issue of "commercial impracticability" as codified in Section 2-615. The Court of Appeals stated, in its opinion (p. 5) that this case involves issues of first impression. In fact, there are relatively few cases in other jurisdictions applying Section 2-615, enacted in 49 states, and none of those cases present the issues as sharply as does the instant case.

The clear intent of Section 2-615 was both to expand, and to ease the rigors which had previously constrained, the common law doctrines of impossibility and frustration. See Comment 3 to Section 2-615. The question before the Court is the extent to which the legislative mandate effects a change in the common law.

The law set out in Section 2-615 affects every commercial sales contract of goods entered into in this State. Thus, its proper interpretation is of great general interest and importance to the business community. A definitive ruling is required by the Supreme Court of Missouri with regard to the extent to which the doctrine of commercial impracticability is applicable, the conditions under which it may be invoked, and the manner in which it should be applied by the Courts.

B. The opinion is contrary to a previous opinion of the Missouri Court of Appeals, Eastern District

In its briefs, in argument, and in its motion for rehearing or transfer, Peabody placed heavy emphasis on the ground breaking impact of the recent case of *Howard v. Nicholson*, 556 S.W.2d 477 (1977), decided by the Missouri Court of Appeals, Eastern District. Notwithstanding such emphasis, together with Plaintiff-Respondent's strenuous efforts to discount the decision, the Court made no mention whatsoever of *Howard*. The significance of *Howard* cannot and should not be ignored.

As in this case, *Howard* dealt squarely with the question of foreseeability, i.e., the determination of whether or not a contracting party assumed a certain risk in performing. *Howard* was a case decided on the basis of the doctrine of commercial frustration rather than on the doctrine of commercial impracticability. However, the two doctrines are so closely related by the common element of foreseeability that there is no perceptible difference between them. Section 2-615 was not applicable in *Howard* because the case did not involve the sale of goods, but there is no mistaking that the Court treated frustration and impracticability as being analogous. Thus, the Court said (l.c. 483):

> "The doctrine of commercial frustration, like that of impossibility of performance, grew out of the demands of the commercial world to excuse performance in cases of extreme hardship. Sound public policy, while requiring that the doctrine be limited in its application so as to preserve the certainty of contract requires the law to be flexible and equitable in situations where unexpected contingencies operate to make performance valueless and the allocation of contractual risks capricious or fortuitous. . . . 20A Mo.Stat.Ann., *§ 400.2-615 (Vernon's 1975) (Analogy to transactions in goods.)*" (Emphasis added.)

In *Howard* the Court held that an owner was excused from performance where it had entered into an agreement with a contractor for construction of a bridal salon, the value of which was destroyed by the bankruptcy of the prospective tenant. In excusing the owner from performance, the Court said (l.c. 483):

> "While the possibility of bankruptcy of businesses in general is a foreseeable and all-too-frequent occurrence, the future bankruptcy of a particular company, the continuing existence of which was essential to complete the entire transaction, *was not reasonably within the contemplation of the parties at the time of contracting* such that the parties would have made provision for such an event." (Emphasis added.)

After the adoption of Section 2-615, the Court, as did the *Howard* Court, is required to put itself in the place of the parties at the time of contracting and to determine whether the occurrence of the event during performance, not the possibility of the event itself, was "reasonably within the contemplation of the parties at the time of contracting." In Peabody's case, the Court's approach was that the possibility of the event ought to have been foreseen and is erroneous. There is no evidence in the record in this case that, in 1967, the 1973 Arab Oil Embargo and its effect on the costs of mining were foreseen. Rather, there is positive uncontradicted evidence to the contrary (Tr. 625-626). The assertion by the Court of Appeals (p. 16) that the "possibility [of the Embargo] was common knowledge" is totally unsupported by any evidence in the record.

There is a clear need for this Court to review this case in light of the *Howard* case, a milestone in the development of contract law of this State, which was totally ignored in the opinion of the Court of Appeals.

C. The distinction between large and small companies made by the Court of Appeals is contrary to Section 2-615

The ability to absorb losses in performing a contract is irrelevant in determining whether performance is impracticable under Section 2-615. In essence, however, the Court of Appeals held (pp. 11-12) not only that a seller's size bears on foreseeability, but also that a seller is not to be excused under Section 2-615 from performing a contract if it is of sufficient economic strength or size to absorb the loss. Impracticability must be determined by looking only to the contract itself.

In *Iowa Electric Light & Power Co. v. Atlas Corp.*, 23 UCC Rep. Serv. 1171 (U.S. N.D. Ia. 1978), cited by the Court as an "acceptable precedent," the Court said (l.c. 1180-1181):

> *"For purposes of analyzing this case under any of the espoused theories, the contract should normally stand alone, i.e., corporate financial conditions should be irrelevant.* However, the relationship of the contract with more recent ones entered into by Atlas at higher market prices leads the Court to the conclusion that disaster was at least partly attributable to the type of prudent business decisions which point to substantial long-term profit for Atlas Corporation's Minerals Division." (Emphasis added.)

By its latter comments, the Court was not suggesting that the seller be required to set-off its losses against other profitable contracts. The Court was referring to the fact that the seller consciously made a business decision to change its production methods, which caused a loss on the litigated contract, but which would insure profitability on subsequent contracts. There was no evidence that Peabody's loss under the Agreement was due to internal business decisions.

None of the Comments to Section 2-615 states or infers that a seller's financial ability to perform a contract is to be taken

into consideration. Further, commentators on Section 2-615 have likewise stated that a seller's other resources are not relevant considerations. See R. Duesenberg & L. King, *Sales & Bulk Transfers under the Uniform Commercial Code*, Vol. 3A § 14.13[3] at p. 14-92 (1978).

The Court in this case has introduced an element of unpredictability into commercial law by injecting size and ability to absorb losses into a determination of commercial impracticability. Further, the decision creates two rules of law: one for large sellers and one for small. Beyond the difficulties inherent in applying the two rules, such a classification is not rationally related to the purpose of Section 2-615, and violates the Equal Protection and Due Process Clauses of both the United States and Missouri Constitutions, 14th Amendment, Article I, Sections 2 and 10, respectively. See *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533, 37 L.Ed.2d 782, 787 (1973).

D. The opinion of the Court of Appeals on venue is contrary to previous Missouri law

As to venue, the Court of Appeals totally ignored the activities of each party which occurred between September 16, 1974, the date the Court found an anticipatory breach by Peabody, and May 6, 1975, the date of the termination letter by Peabody. These activities negate or retract any anticipatory breach as a matter of law. The Court failed to consider the uncontroverted evidence of: Peabody's continued uninterrupted delivery of coal to Public Service; an actual increase in Public Service's stockpile (Tr. 170-171, 163-165); Public Service's unequivocal acceptance of Peabody's performance without any demand (Tr. 122, 384); and Public Service's failure to notify anyone of the claimed anticipatory breach (Tr. 117, 141-142). These facts fail, as a matter of law, to demonstrate "a clear determination not to continue with performance" as required by the Comments to Section 400.2-610, R.S.Mo. 1969, for finding an anticipatory breach. Alternatively, Peabody's performance and Public Service's acceptance of performance amounted to a retraction as a matter of law pursuant to Section 400.2-611, R.S.Mo. 1969. Finally, the opinion of the Court is in conflict with the decision of the Court in *Taussig v. Southern Mill & Land Co.*, 124 Mo. App. 209, 101 S.W. 602 (1907), which does not permit a party, like Public Service in this case, to accept performance, perform itself, and then claim anticipatory breach.

If facts establishing negation or retraction of a claimed anticipatory breach are to be ignored, as they were by the Court of Appeals, then clearly a re-examination of existing law by the Court is required.

In the early stages of the case, Peabody sought a writ of prohibition in this Court on this issue with an abbreviated record, and the writ was denied without opinion. As this Court has held, the denial of the writ did not amount to an adjudication of venue on the merits, *St. Louis Smelting and Refining Co. v. Hoban*, 209 S.W.2d 119, 123 (Mo. 1948).

On the grounds and for the reasons stated, Peabody respectfully asks for transfer to this Court.

Respectfully submitted,

THOMPSON & MITCHELL
WILLIAM G. GUERRI
EDWIN D. AKERS, JR.
JOHN H. STROH
One Mercantile Center
St. Louis, Missouri 63101
314-231-7676

MARVIN O. YOUNG
301 North Memorial Drive
St. Louis, Missouri 63102
314-342-3496

DIETRICH, DAVIS, DICUS,
ROWLANDS & SCHMITT
EDWARD E. SCHMITT
1004 Baltimore Avenue
Kansas City, Missouri 64105
816-221-3420

Attorneys for Defendant-Appellant
Peabody Coal Company

APPENDIX D

In the Supreme Court of Missouri

Missouri Public Service Company,
Plaintiff-Respondent,
v.
Peabody Coal Company,
Defendant-Appellant.
No. 61294

Appeal from the Circuit Court of Jackson County, Missouri
Division 14

Honorable Robert A. Meyers, Judge

Motion of Appellant Peabody Coal Company for This Court to Suspend Its Rules and for Reconsideration of Application to Transfer

(Filed April 18, 1979)

Comes now Appellant, Peabody Coal Company ("Peabody"), and moves the Court pursuant to Rule 84.08 Mo.R.C.P. to suspend in this matter so much of Rule 83.03 Mo.R.C.P. providing:

> "Motions for reconsideration of the Court's action in refusing an application for transfer shall not be accepted or filed."

and further, by leave, moves the Court to reconsider its Application to Transfer to this Court heretofore denied.

As grounds for said motions, Peabody respectfully shows the Court that justice, and its proper administration, requires suspension of said rule and reconsideration of Peabody's Application to Transfer.

Peabody submits that this Court may have viewed Peabody's appeal as an ordinary contract dispute between two large companies and overlooked the fact that the propriety of its Application to Transfer is mandated by three grounds set out in Rules 83.02 and 83.03, Mo.R.C.P., specifically:

(a) the substantive question of law in this case is of general importance and of first impression under § 400.2-615, R.S.Mo., and should be answered by the highest Court of this State;

(b) the decision complained of is contrary to a previous decision of an Appellate Court of this State; and

(c) the decision complained of compels a re-examination of existing law.

This appeal and Application to Transfer present a rare opportunity to this Court, as one of the few courts of last resort in the Nation to deal with the substantive issue raised, to write an opinion which will engage the attention of the bench and bar of America.

Of principal concern is the conflict created by the decision of the Western District Court of Appeals with the earlier decision of the Eastern District Court of Appeals, *Howard v. Nicholson*, 556 S.W.2d 477 (St. L.D.C. App., 1977). The effect of the decision complained of is to create confusion by establishing two opposing standards to evaluate or regulate similar conduct in similar contexts. At present, neither the Courts nor lawyers can know which of the two rules is correct. Unless and until this Court resolves this conflict, lawyers will be unable to provide proper advice to the business and commercial community of the State. Evaluation of, literally, thousands of existing contracts by counsel, particularly those of longer duration, is dependent on clarification by this Court, as are decisions with regard to the wording and contents of contracts to be executed in the future.

The Courts will not have proper guidance to determine issues before it. There is now presently pending in the Circuit Court of St. Louis County, Missouri, Cause No. 418006, *Peabody Coal Company v. Kansas City Power & Light Company*, in which the same substantive issue as that presented by this appeal is present. Peabody, the plaintiff in that case, cannot predict which rule of decision will be followed by the Circuit Court.

The substantive issue presented by this appeal, whether it be called common law frustration, common law impracticability, or commercial impracticability under § 400.2-615, R.S.Mo., is of general and signal importance to any one who makes or performs contracts: under what circumstances may a party to an executory contract be excused from its performance by the occurrence of events or conditions, the existence of which were not presupposed by the contracting parties at the time of contracting, and which frustrate their expectations or render performance impracticable. The importance of having this Court resolve that singularly important issue of commercial law by the highest Court of this State is plainly not peculiar to this appeal or to the parties to this case. The issue is of major import to commercial law in this State and, indeed, nationally.

The decision of the Western District Court of Appeals is contrary both to common sense and to justice, substitutes a subjective test, with all of its attendant dangers of administration and inherent unpredictability of application, for the standard previously established by *Howard v. Nicholson* (supra). There, the Eastern District Court of Appeals held that the standard for determining whether or not the occurrence of the condition or event was presupposed by the parties at the time of contracting required the trier of fact to determine whether or not the occurrence of the condition or event was then *reasonably within their contemplation*, or expressed another way, was reasonably foreseeable at that time. As opposed to this, the Western District Court of Appeals held that the standard to make this determina-

tion was whether or not the party seeking the excuse *ought to be held* to have foreseen the condition or event and, apparently, answered the question on the basis of Peabody's size or on other matters outside of the record on appeal.

The commercial law determines the conduct of day-to-day business. The law is used as a basis for outcome prediction and business planning, but this is not possible where the law is uncertain and decisions of intermediate appellate courts are in conflict. In substituting a test totally dependent upon the uncontrollable, unknowable and unreviewable vagaries of a trier of fact for the reasonably objective test of *Howard*, the Western District Court of Appeals has injected into that body of law an element of hazard and personal predeliction in lieu of that of predictability.

There is a real need for a definitive ruling by this Court with regard to the extent to which the doctrine of commercial impracticability is applicable, the conditions under which it may be invoked, and the manner in which it should be applied by the courts.

For the reasons stated, Peabody respectfully asks this Court to suspend its rules and reconsider its decision denying Peabody's Application to Transfer.

Respectfully submitted,

THOMPSON & MITCHELL
WILLIAM G. GUERRI
EDWIN D. AKERS, JR.
JOHN H. STROH
One Mercantile Center
St. Louis, Missouri 63101
314-231-7676

APPENDIX E

IMPORTANT NOTICE

Missouri Court of Appeals
Kansas City District

Date: February 26, 1979

In Re: Missouri Public Service Co. v. Peabody Coal Co.

KCD # 29611

Appellant

Respondent Motion for rehearing overruled.

Transfer to Supreme Court denied. See Rule 83.03

cc: William Sanders, Judith P. Rea, Edward Schmitt

Mary Louise Thomas, Clerk

APPENDIX F

(Filed April 10, 1979)

No. 61294

In the Supreme Court of Missouri
Western District No. 29611

January Session 1979

Missouri Public Service Company, Respondent,

vs. TRANSFER

Peabody Coal Company, Appellant.

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

APPENDIX G

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

June 19, 1979

Thomas F. Simon
Clerk

Telephone
(314) 751-4144
Mail
P. O. Box 150

Mr. William G. Guerri
One Mercantile Center
St. Louis, MO 63101

In Re: Missouri Public Service Company v. Peabody Coal Company—No. 61294

Dear Mr. Guerri:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Appellant's motion to suspend the rules to permit filing of motion for reconsideration of application to transfer overruled."

Very truly yours,

THOMAS SIMON
Clerk

cc: William H. Sanders
Judith P. Rea

Supreme Court, U. S.
FILED
AUG 7 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-29

PEABODY COAL COMPANY,
Petitioner,

vs.

MISSOURI PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM H. SANDERS, SR.
CHARLES A. SCHLIEBS
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Five Crown Center
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

JUDITH PAXTON REA
10700 East 50 Highway
Kansas City, Missouri 64138
(816) 353-5042

Attorneys for Respondent, Missouri Public Service Company

August 8, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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4 J. Pomeroy, Equity Jurisprudence §1405a at 1044 (5th Ed. 1941) 16

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-29

PEABODY COAL COMPANY,
Petitioner,

vs.

MISSOURI PUBLIC SERVICE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Missouri Public Service Company ("Public Service") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion in this case of the Missouri Court of Appeals, Western District ("Court of Appeals"). That opinion is unreported but has been reproduced in Appendix A of the petition for writ of certiorari filed by Peabody Coal Company ("Peabody").

STATEMENT OF THE CASE

This proceeding arises out of an action by Public Service for specific performance of a long-term Coal Supply Agreement ("Agreement") between Peabody, the seller, and Public Service, the buyer. Peabody is a large producer and seller of coal, and Public Service is an electric utility company operating a coal-fired generating station serving customers with electric power in northwest Missouri.

The Agreement, executed in 1967 and operational in June, 1969, required Peabody to supply coal to Public Service's generating plant for a period of ten years. The price escalation provisions agreed upon by the parties escalated the price of coal (1) on the basis of changes in actual costs for certain items (Exhibit 2, ¶¶ 5[A](1)-(4)) and (2) for material and supplies, explosives, electric power and administrative and supervision expense on the basis of changes in the index number for Industrial Commodities shown in the Indexes of Wholesale Prices issued by the United States Department of Labor Bureau of Labor Statistics. ("Industrial Commodities Index") (Exhibit 2, ¶ 5 [A](5)).

Negotiations

In the negotiations leading up to the execution of the Agreement, Peabody drafted and supplied to Public Service the first draft of a long-term coal supply contract, Exhibit 3A. (Tr. 278, 409, 410) In this first draft provided by Peabody, the price of coal would have escalated with and been tied to the actual costs of fifteen different items, including a "catch-all" provision for "costs not enumerated". In addition, Peabody's first draft included an item that would have allowed Peabody to escalate the price of coal for general inflation. (Exhibit 3A, ¶¶ 5[B](1)-(15) and [C]).

Public Service was unwilling to accept Peabody's first proposal, and also Peabody's second proposal, because those drafts would have escalated the price through numerous adjustments and pass-ons without any reasonable limitation. (Tr. 315-16, 414-19, 12).

Charles Veskerna was the Peabody Vice President who negotiated with Public Service for a coal supply contract. With regard to the negotiations for and execution of the Agreement, Veskerna of Peabody testified as follows:

1. The possibility of runaway inflation came across Veskerna's mind as he negotiated for the Agreement with Public Service. (Tr. 282-84).

2. In the negotiations for a coal supply contract with Public Service, which were admittedly at arms-length (Tr. 285), Veskerna wanted to get as much protection for Peabody against possible inflation as he could. (Tr. 285). Accordingly, Veskerna argued with Public Service about the portion of the contract concerning the method of determining cost increases. (Tr. 285).

3. Veskerna would have preferred to have obtained a price revision clause for materials and supplies based on actual costs (Tr. 305-06), rather than on the Industrial Commodities Index, which Veskerna realized might not increase the same way that actual materials and supplies purchased by Peabody would increase. (Tr. 307).

4. Veskerna of Peabody believed that Peabody would be unwilling to accept the contract terms desired by Public Service with respect to price revision (Tr. 293), because Veskerna realized that the contract terms upon which Public Service was insisting would not cover Peabody's entire future costs. (Tr. 293).

5. Veskerna left the decision of whether to accept Public Service's terms to Merle Kelce, President of Peabody, who after deliberation decided to accept the contractual terms desired by Public Service. (Tr. 294; Exhibit 2).

6. Peabody hoped to make up for any possible loss on the Agreement with Public Service by increased mine productivity. (Tr. 289).

7. At the time Public Service was seeking bids on its long-term coal supply agreement, competition was keen among the coal companies. (Tr. 249). Peabody wanted

Public Service's business (Tr. 248), and whether Peabody could make money on the Agreement over a ten-year period was simply a "chance" Peabody had to take. (Tr. 295, 296).

In addition to providing for a base price with factors for escalation, the final draft of the Agreement contained provisions penalizing Peabody if coal delivered to Public Service was not of a specified BTU content. (Ex. 2, ¶ 5[B]; Tr. 520, 521).

The final draft of the Agreement, Exhibit 2, was agreed upon and executed by Peabody and Public Service in 1967.

Renegotiation Attempts By Peabody

After Exhibit 2, the Agreement, was signed in 1967, Peabody did not attempt to change the contract until 1974. (Tr. 327, 328). Veskerna of Peabody then advised Public Service that Peabody's expenses were greater than Peabody liked to see them, and that Peabody was not making the profit it had intended to make on the contract. (Tr. 329, 330). Veskerna's opinion was that "if Peabody does not make money on a contract, Peabody should threaten to shut off the supply of coal. (Tr. 272, 273). Additionally, Peabody had recognized the actual stoppage of shipments as a definite "leverage possibility." (Ex. 18). Accordingly, Veskerna further advised Public Service that if Public Service was not willing to increase the price it was paying, Peabody would have no choice but to shut down the particular mine it used to supply Public Service and to discontinue shipments of coal to Public Service. (Tr. 34, 329, 330).

Peabody knew that in the tight coal market of 1974-75 Public Service could not obtain large amounts of coal elsewhere. In fact, Peabody knew that if it simply shorted Public Service "200,000 tons this year [1974 or 1975], it is Veskerna's opinion that Missouri Public could not make that up on the outside." (Ex. 18).

In addition to demanding a new base price for coal, Peabody demanded that Public Service agree to *all* of the following modifications or additions to the Agreement:

(1) A decrease in the BTU quality of the coal specified in the Agreement (Tr. 381; Ex. 18; Ex. 42, p. 5; Ex. 39, p. 8), and

(2) A price for coal sufficient to give Peabody a "full return" of 15-20% on its investment (Tr. 334-36), and

(3) A "gross equity" (sic—inequity) clause which would call for price adjustment whenever the profit to Peabody was not up to the level Peabody desired (Tr. 381), and

(4) A pricing factor based on the productivity of Peabody's mines (Tr. 381), and

(5) A general inflation clause using an index to take care of depreciation, taxes and profit (Tr. 381), and

(6) A pricing factor tied to actual costs for materials and supplies (Tr. 381), and

(7) A payment for the acquisition of additional reserves (Tr. 532-36; Ex. 39, pp. 3 and 7), despite the fact that reserves more than adequate for Public Service's needs had been committed by Peabody to Public Service in 1967. (Tr. 267-70).

Peabody claimed in support of its renegotiation demands, particularly in the presentation to Public Service which Peabody itself termed a "dog and pony show," that Peabody would not be a "viable" corporation if it could not obtain the demanded price increases from Public Service. (Ex. 65).

While under economic duress due to the threatened cut-off of coal supply during a period of unusually high

demand, Public Service offered a $1 per ton price increase which would have given Peabody, using Peabody's own figures, a profit through the period of the contract up to the time of trial.[1] Peabody refused the offer. (Ex. 41, Tr. 511).

Litigation

After Public Service was advised of a specific date at which time Peabody would cease shipping coal to Public Service, Public Service filed on May 23, 1975 its petition for specific performance of the Agreement and also for damages for breach of the Agreement. By stipulation, a separate trial was held on the issue of specific performance.

The Circuit Court of Jackson County, Missouri entered judgment against Peabody for specific performance and that judgment was affirmed by the Court of Appeals in its judgment and opinion filed on January 29, 1979. (Appendix A to petition).

In the trial court and the Court of Appeals, Peabody asserted that it was excused from the terms of the Agreement by virtue of § 400.2-615 R.S.Mo. (§ 2-615 of the Uniform Commercial Code, as enacted in Missouri). Peabody claimed that the 1973 Arab Oil Embargo and general inflation were unforeseen contingencies not within the reasonable contemplation of the parties at the time the Agreement was executed in 1967. The effect of these so-called

1. Public Service's offer was subject to Missouri Public Service Commission approval and retroactive to January, 1975. By multiplying the number of tons on Exhibit 53 for both 1975 and 1976 (through May) by $1 ($1,262,285), adding to that figure the penalties Peabody incurred over the contract through April 1976 ($1,796,466) (Ex. 61, Tr. 521), and comparing the sum of these two figures ($3,058,751) to Peabody's alleged loss of $3,020,019, it is evident that Peabody would have made a profit of at least $38,732 before penalty charges through May 1976.

contingencies, according to Peabody, made performance of the Agreement "commercially impracticable", thereby excusing Peabody from further performance.

Peabody argued that the effect of the contingencies was a loss to Peabody on the Agreement of $3,020,019. Peabody's Vice President for Contract Administration, Ganey, testified that the contract "penalties" for not meeting BTU specifications "are not the major reason" for Peabody's claimed loss of $3,020,019. (Tr. 521). However, on cross-examination, Ganey of Peabody admitted that the claimed loss of $3,020,019 in Peabody's Exhibit 53 (which Ganey prepared for presentation to the trial court) included price penalties against Peabody for not meeting BTU specifications of the Agreement totalling $1,796,446. (Tr. 521-23). In other words, 60% of Peabody's claimed loss was due to its own inability or unwillingness to supply coal meeting the quality standards of the Agreement.

The Court of Appeals began its consideration of the issue of excuse by commercial impracticability by quoting the relevant statute and making reference to the comments accompanying the statute, with emphasis on particular portions of comment No. 4 as follows:

> 4. *Increased cost alone does not excuse performance* unless the rising cost is due to some unforeseen contingency which alters *the essential nature of the performance.* Neither is a rise or a collapse in the market itself a justification, *for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.* (Emphasis of the Court of Appeals).

The Court of Appeals then enumerated the factors necessary to establish a claim of commercial impractica-

bility under § 400.2-615 R.S.Mo.: "(1) the occurrence of a contingency; (2) the non-occurrence of which was a *basic assumption* upon which the contract was made; (3) by which occurrence further performance has become commercially impracticable." (Emphasis of the Court of Appeals) (Appendix A of the petition, A-10).

In the portion of the opinion wherein the alleged Constitutional deficiencies lie, the Court of Appeals discussed considerations that might be used in applying the statute. The Court of Appeals stated:

> The fact that the statute is drawn in such general terms is to provide flexibility in its application and full scope for the application of equitable principles and considerations with which the doctrine of commercial impracticability is imbued, as recognized in the Transatlantic Financing Corp. decision [Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966)]. When so viewed and applied, a wide variety of commercial situations often unique to the particular case under consideration are subject to scrutiny. This is particularly true in a case such as the one at bar, where the claim of commercial impracticability is based primarily upon the fact that the performance of the contract results in great financial loss to Peabody due to increase in cost of production (due to the causes enumerated) which were not foreseeable at the time the contract was made. In this connection, Peabody argues that in the resolution of this issue, only the contract in litigation should be considered by the court and that the factors of Peabody's financial condition, experience in the production of coal, resources, availability of the raw material (coal reserves) and other factors should be disregarded. This argument is without merit and Peabody cites no authority in support thereof. Those factors have a direct bearing and evidentiary value in determining the question of foreseeability of the occurrence triggering the loss. See e.g. Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F.Supp. 429 (S.D. Fla. 1975). A commercial, governmental or business trend affecting a contract's value which would be foreseeable to a party with wide experience and knowledge in the field and, perhaps, not to a party with less; a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than to a party without them; and, the application of the doctrine and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, outside the strict confines of the contract itself.

However, the holding of the Court of the Appeals was that the occurrences about which Peabody complained, such as the 1973 Arab Oil Embargo and general inflation not sufficiently represented in the Industrial Commodities Index, were not unforeseeable at the time the contract was negotiated. Furthermore, the Court of Appeals found that Peabody simply "made a bad bargain," and that that neither deals with the "basic assumption" on which the contract was negotiated nor alters the "essential nature of the performance" thereunder so as to constitute "commercial impracticability". (Appendix A of the petition, at A-13-14).

In a motion for rehearing and application for transfer to the Supreme Court of Missouri, filed in the Missouri Court of Appeals, Peabody asserted that the Court of Appeals devised two separate rules for determining when a party may be excused from a contract, one for large

sellers and another for small sellers. Peabody alleged a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. (Appendix B of Peabody's Petition, at A-19, 23). The Court of Appeals denied the motion and application without comment, and the Missouri Supreme Court denied without comment both a similar application and a further motion filed by Peabody which would, if granted, have permitted Peabody to move for reconsideration of the motion to transfer. (Appendices E, C, F, D, and G of the petition).

REASONS WHY THE WRIT SHOULD BE DENIED

I. Neither the record nor the opinion below raises the Questions Presented in the petition.

A. The record does not raise the Questions Presented in the petition.

The case at bar turns on its own facts, and Peabody's Statement of the Case provides a severely distorted view of those facts.

Peabody has structured its version of the facts to give the appearance that a showing that Peabody was sufficiently large to complete its performance under the Agreement was determinative of Peabody's liability in the opinion of the Court of Appeals. This was not the case in any sense or to any degree.

Peabody's fact statement implies that Public Service's evidence consisted solely of presenting Peabody's experience in coal production, its available reserves and resources and their value, and Peabody's financial condition. (Petition, p. 7). Peabody clearly attempts to leave the

impression that such information was provided to the Court in an effort to improperly prejudice both the trial court and the Court of Appeals.

It is true that Peabody is the world's largest coal company in tons produced (Tr. 652) and has the world's largest or second largest coal reserves. (Tr. 592-93). It is also true that Peabody has had substantial experience in coal production. Furthermore, it is true that Peabody was a profitable company during the time periods relevant to this case, e.g., in 1974 Peabody quadrupled its profit from 1973 to $29,304,000. (Tr. 562). In addition, the two mines that Peabody used to supply coal to Public Service made a return on investment of 8.1% and 9.4%, respectively, as of May 31, 1974. (Tr. 586, Ex. 21). Such facts were made known to the trial court and Court of Appeals for the following reasons:

1. Peabody asserted in the renegotiation process, particularly in a presentation to Public Service which Peabody itself referred to as a "dog and pony show," that Peabody would not be a "viable" corporation unless it received the demanded price increase from Public Service. (Ex. 65). Peabody also told Public Service that the profit at Peabody's mines which supplied Public Service was inadequate, and that Peabody "would have no choice but to shutdown the mine and discontinue shipments of coal." (Tr. 34). Public Service accordingly believed it was quite relevant to show that the very corporation claiming it would be forced to close its mines and that it would not be "viable" was the same corporation whose profits had quadrupled, whose coal reserves tremendously increased in value due to the energy situation, and whose mines supplying Public Service were making an 8 to 9 percent return on investment.

2. It would be superfluous for a court to mandate performance of a contract when the party to perform did not have the technical or financial ability to do so. Again, it was relevant to introduce evidence concerning Peabody's technical and financial ability to mine and deliver coal.

3. Furthermore, Public Service desired to show that Peabody was not negotiating contracts as if it were a "mom and pop" coal company. Peabody was of a size and sophistication that it would be aware of the major energy developments at the time the contract was negotiated, such as the 1967 Arab Oil Embargo, and further aware that a price index, being an average of prices for a multitude of items, might not accurately reflect price increases for the specific items used by Peabody. Therefore, in connection with the foreseeability of Peabody's so-called "unforeseen contingencies" such as the 1973 Arab Oil Embargo and the Industrial Commodities Index not reflecting Peabody's actual costs, it was relevant for Public Service to introduce evidence of Peabody's size and position in its industry.

4. When Peabody decided to accept the terms of the Agreement, despite the belief of its Vice President Veskerna that it could not make money on the Agreement unless mine productivity increased, Peabody assumed the risk that the Agreement would not be one of its profitable utility coal supply contracts. Peabody's size and financial condition is relevant here because a company the size of Peabody is able to take such a risk for several reasons, one of which is the large number of coal supply contracts to which it is a party. Losses on some contracts of high risk may be offset by unexpectedly high profits on others. Companies of medium or small size in the industry could

probably not afford to take such a risk as Peabody admittedly did on the Agreement with Public Service, since any one particular contract would account for a much larger part of a medium or small company's revenues. It would be particularly inequitable for a large company such as Peabody to underbid smaller companies on contracts, knowing it could rely on its size to protect it from serious financial injury should the contract prove to be unprofitable as predicted by its company officials, and then be excused from the contract when the predicted unprofitability becomes true.

While the facts presented to the trial court and the Court of Appeals concerning Peabody's experience, size and financial condition were certainly relevant, they played a minor role compared to the facts which establish that Peabody, regardless of its size, knowingly and willingly assumed the risks of various occurrences—occurrences about which Peabody now complains.

Peabody's initial draft of the Agreement (Ex. 3A) was prepared with the idea of fully protecting Peabody from the contingencies about which Peabody now complains and every conceivable contingency regarding cost. Nonetheless, realizing that on an arm's length basis it was out-negotiated by Public Service regarding price revisions, and realizing the potential loss situation that could occur, Peabody entered into the contract with Public Service in its final form because it wanted the business. (Tr. 285, 288). To get Public Service's business, Peabody voluntarily shifted from Public Service (per Exs. 3A and 3) and allocated to itself (per the Agreement, Ex. 2) the risks:

1. Of not having a general inflation clause. (Paragraph 5[C] of Exs. 3A and 3).

2. Of not having a "catch-all" provision to cover almost any conceivable cost. (Paragraph 5[B](15) of Ex. 3A).

3. Of not having increases in materials, supplies, explosives, etc., tied to actual changes in unit prices. (Paragraph 5[B] of Exs. 3A and 3).

4. Of having certain costs tied to an index which by definition takes into account increased costs of certain but not all items. (Tr. 307—Peabody knew it was a "chance" that the index would increase the same way its materials and supplies increased.) (Public Service took the risk that costs of items reflected in the index that have nothing to do with mining would cause the index to rise faster than the cost of materials and supplies used in Peabody's operation). (Paragraph 5[A](5) of Ex. 2).

5. Of being able to make up for possible losses through various ways, including increased productivity. (Tr. 289).

6. Of Peabody making money on the contract over a ten-year period. (Tr. 294).

7. Of Peabody being able to meet the BTU specifications and thereby avoiding penalties which created 60% of its alleged loss.

This case turned on its facts—facts which demonstrated that Peabody assumed the risk of a "bad bargain".

B. The opinion below does not raise the Questions Presented in the petition.

Peabody severely misconstrues portions of the opinion of the Court of Appeals.

First, there was no statement in the opinion below that the Court of Appeals "refused to find commercial

impracticability, because in the Court's view, Peabody was able to absorb the loss." (Petition, p. 8). The Court's primary focus was on the issue of the foreseeability of the allegedly unforeseen contingencies, the Court noting that factors such as financial condition and coal production experience were relevant in considering that issue. (The relevance of such factors is demonstrated in Section IA, *supra.*) After focusing on foreseeability, the Court of Appeals then noted that equitable principles "might call for relief in one instance and not in another" based upon factors outside the strict confines of the contract. As an example of such a factor, the Court of Appeals gave that of the degree of hardship on the defendant. Beyond these general comments on possible considerations, the Court of Appeals made no statements concerning the size or financial status of any party to a contract, let alone Peabody.

Second, and perhaps more importantly, the opinion below bases its holding on findings unrelated to Peabody's ability to absorb a loss.

The holding of the Court of Appeals goes straight to the heart of commercial impracticability—(1) the alleged "unforeseen contingencies" were in fact foreseeable; (2) Peabody simply "made a bad bargain"; (3) Peabody's situation did not deal with the "basic assumption" on which the contract was negotiated; and (4) there was no alteration of the "essential nature of the performance." (Appendix A at A-13-14).

The facts made it clear that Peabody knowingly and willingly made a bad bargain, and accordingly, without reference to an ability to absorb the loss and without raising the Questions Presented in the petition, the Court of Appeals found that the trial court properly decreed specific performance.

II. Even if the Questions Presented in the petition were raised by the opinion or record below, the alleged use of the equitable consideration of degree of hardship in determining whether specific performance should be granted against a seller under § 400.2-615 R.S.Mo. does not violate the Fourteenth Amendment to the United States Constitution.

The Court of Appeals acknowledged the basis in equity of the consideration that a "loss to a party with vast resources and amply supply of raw materials to perform a bad bargain would be less harmful than to a party without them." (Appendix A at A-10-11). As stated in 4 J. POMEROY, EQUITY JURISPRUDENCE, § 1405a at 1044 (5th Ed. 1941), the remedy of specific performance must not result in hardship or oppression; the hardship or oppression may be determined from the situation of the parties, unconnected with the terms of the contract or with the circumstances of its negotiation and execution, "that is, from external facts or events or circumstances which control or affect the situation of the defendant." The Court of Appeals recognized in its opinion that a party with vast resources may not qualify, in the sound discretion of the court, for equitable consideration based on oppression or hardship—certainly not an unconstitutional position.

The assertion that the long-established equitable principle of considering a party's financial condition violates the Fourteenth Amendment is wholly without merit. Petitioner Peabody accordingly notes it can find no case authority concerning the questions it presents to this Court.

Furthermore, "commercial impracticability" is not defined in § 400.2-615 R.S.Mo. or in the comments thereto, and has been left to be defined in the case law. Despite Peabody's protestations to the contrary, there is no authority

that a party's financial condition may not be considered in determining "commercial impracticability." In fact, all available case authority indicates that a party's financial condition is or may be a relevant consideration. In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975), the court found Gulf's hardship insufficient to qualify for commercial impracticability, in that among other factors, while Gulf's foreign oil costs were up four-fold during 1973-74, Gulf's foreign oil profits went up four-fold in that period. 415 F. Supp. at 440. Also, Gulf's overall profits went up to 25% during that same period. 415 F. Supp. at 441. Just as the degree of hardship can be considered in a common-law evaluation of a right to specific performance, there is no reason, as in the *Gulf* case, that the level of a party's ability to perform cannot be considered in determining what is "commercial impracticability."

Even in the only case relied upon by Peabody for its proposition that financial condition is irrelevant under § 400.2-615 R.S.Mo., the Court refused to rule out the consideration of a party's financial condition in determining whether "commercial impracticability" existed. *Iowa Electric Light & Power Co. v. Atlas Corp.*, 23 U.C.C. Rep. Serv. 1171 (N.D. Ia. 1978, appeal filed with 8th Cir.). In fact, the Court in *Iowa Electric* did consider defendant Atlas Corporation's financial condition because Atlas had its overall profitability in mind in the way it operated under its contract with Iowa Electric. Likewise, Peabody knew that it was not operating at capacity (Tr. 248) and had in mind its overall financial position when it entered into the contract with Public Service. And further, Peabody must have considered its overall condition when it decided to supply more utilities from the mines supplying Public Service, thereby mining harder to reach coal with attendant increased costs. (Tr. 262, 263, 324). While under

narrower circumstances, the court in *Iowa Electric*, just as in *Eastern Air Lines, Inc. v. Gulf Oil Corp., supra*, found it relevant to consider the overall financial condition of the defendant in a "commercial impracticability" case.

Peabody's contention that the term "commercial impracticability" does not allow consideration of a party's financial condition is unsupported by the statute, the comments thereto, and the relevant case authority. What should be considered in determining "commercial impracticability" has been left to the courts, which are thus far unanimous in finding that a party's finincial condition may indeed be relevant in determining "commercial impracticability."

Despite references to nineteenth century case law on due process, Peabody's claim is actually that the Equal Protection Clause of the Fourteenth Amendment has been violated by a classification on the basis of wealth. While Public Service is unable to view the Court of Appeals' opinion as making such a classification, this Court in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973), held that wealth is not a suspect category in applying the Equal Protection Clause of the Fourteenth Amendment. 411 U.S. at 24. Therefore, the test in a wealth discrimination case is that of rationality. Moreover, "[i]n the context of commercial regulation, the [United States Supreme] Court has indicated that the Equal Protection Clause 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.'" 411 U.S. at 104 (dissenting opinion; Marshall, J.). The unique facts of the case at bar, as discussed earlier, and the historical application of equitable principles in cases of specific performance, demonstrate the rationality and relevancy in considering a party's ability to perform in an action for

specific performance under § 400.2-615 R.S.Mo. Accordingly, there is no violation of the Fourteenth Amendment by the opinion of the Court of Appeals.

CONCLUSION

Peabody knowingly and willingly entered into a contract which it knew, and which the Missouri Court of Appeals held to be, a "bad bargain." Peabody wanted Public Service's business, and was willing to take the risk of a loss. Regardless of Peabody's size, the risk was clearly taken and Peabody was able to perform. The facts and opinion are grounded on principles unrelated to a denial of Constitutional rights, and Public Service accordingly requests that Peabody's petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM H. SANDERS, SR.
CHARLES A. SCHLIEBS
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Five Crown Center
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700
JUDITH PAXTON REA
10700 East 50 Highway
Kansas City, Missouri 64138
(816) 353-5042
Attorneys for Respondent, Missouri Public Service Company